(19,152.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

BRIEF IN BEHALF OF APPELLANT.

SUMMARIZED NARRATIVE.

On June 11, 1886, the city of Dawson, in the State of Georgia, submitted to its voters the question as to whether the expense of waterworks should be incurred. The ordinance and notice failed to specify the amount of debt proposed, as required by law. More than two-thirds of the voters cast their ballots in favor of the expense, and the result was declared July 18, 1886. Thereupon, the city officials made some attempts to secure a system of waterworks, but with no definite results.

About four years later, the then city council entered into the contract with R. L. Bennett which forms the basis of this suit. Neither in the negotiations leading thereto nor in the contract was there any reference to the election as

the authority thereof, or as an inducement thereto. This contract was in the form of an ordinance adopted February 21, 1890, and was in substance as follows (pr. rec. 288):

> R. L. Bennett, his associates, successors, and assigns, who were to be incorporated as the Dawson Waterworks Company, were granted the exclusive right for ninety-nine years to construct, maintain, and operate a complete and thorough system of waterworks for the purpose of supplying the city and its inhabitants with water for protection against fires and for domestic, sanitary, and other useful purposes. The exclusive right and privilege of excavating and laying water pipes and mains along the streets of the city was also conferred, as well as the right to erect necessary buildings, tanks, etc.
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> The reservoir was required to be of not less than forty thousand gallons' capacity and of sufficient height to produce such pressure on the mains that from any hydrant on the principal streets a stream of water would be projected in still air fifty feet high, through one hundred feet of fire hose and one-inch nozzle, and the company was required to continue during its existence, to furnish a sufficient supply of water for the purposes named, unless prevented by unavoidable and providential cause, in which event it should be allowed a reasonable time within which to make repairs, after which, should it fail to furnish such supply of water, its franchise from that fact should be forfeited.
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> The company was required to enlarge its system from time to time to meet the increased demands consequent upon the growth of the city.
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> In consideration of guarantee by the company that the city would have for twenty years, and as long thereafter as the company should operate the waterworks, a free and unrestricted use of water for fire protection, and fire plugs of approved pattern at convenient places, the city obligated itself to pay to the water company, or to such trust company as the water company might elect as trustee for its bonds, the sum of $2,000 annually for twenty years, payable in semi-annual instalments, and the city was re-

quired to make provision each year for the payment of the stipulated rental by a tax levy.

In consideration of the agreement by the water company to furnish public municipal buildings and fountains with water, the city obligated itself to remit such license fees and taxes as might thereafter be assessed by the city against the water company.

Assent was given by the city to the charter that might be obtained by the water company, conferring upon it the exclusive franchise to construct, maintain and operate a system of waterworks in the city.

It was provided that the provisions of the ordinance should be mutually binding upon the city and R. L. Bennett, and associates, and the company to be organized by them.

This ordinance was accepted by R. L. Bennett and constituted the contract between him and the city. On March 17, 1891, the contract was assigned by Bennett to the American Pipe Manufacturing Company, which, on August 20, 1891, assigned the same to the Dawson Waterworks Company, which had become incorporated.

On June 27, 1894, the then city council passed a resolution declining to carry out the contract.

On October 4, 1894, the city council ordered an election to determine whether bonds should be issued to the amount of $35,000, to erect waterworks and provide electric lights for the city. The election was held December 12, 1894, and the result was in favor of the issuance of bonds, and $10,000 of said bonds were issued and sold and the proceeds used in erecting an electric plant. The remainder of the bonds has not yet been disposed of, the city having been subsequently restrained by order of the court in this cause.

In December, 1894, in pursuance of resolution of the city council, the mayor notified the water company that unless a new agreement was reached the city would not be bound by the contract after January 1, 1895. In pursuance of said

resolution the city refused to pay the water rental for 1895. The water company brought suit in the Superior Court for Terrell County, Georgia, for the 1895 instalments, claiming that the contract was valid and binding for twenty years, and that it had earned the rental for said year. The city pleaded that it had not used the water; that the water was unfit for use, and contended that the contract was not binding as alleged, because the debt created thereby was contrary to the inhibition of the State constitution, the mandatory requirements of law not having been complied with. The Superior Court directed a verdict for plaintiff, and thereupon the city excepted, and the cause was carried on appeal to the Supreme Court of Georgia.

The cause was argued and reargued before said court, which, on March 14, 1899, rendered an exhaustive decision (106 Ga. 696–737), reversing the court below and sustaining the contention of the city, and holding in substance as follows:

> 1. Without preliminary sanction of a popular vote, as required by the constitution, a municipal corporation can not contract for a supply of water, on the credit of the city, for a longer period than one year; and a contract, which by its terms is to run for twenty years, each year's supply to be paid for semi-annually, is operative from year to year, so long as neither party renounces or repudiates it.
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> 2. Even if no legislation is necessary to authorize a municipal corporation to hold an election to determine whether a debt other than a bonded indebtedness shall be incurred, an election held pursuant to an ordinance and notice which do not state the amount of debt to be incurred, will not be sufficient to authorize a contract incurring an indebtedness.
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> 3. Where one enters into a contract with a municipal corporation which is void because opposed to the constitution and laws of this State, and contrary to its settled public policy, complete performance on the part of such person will not prevent the municipal corporation from pleading its want of power, or the illegality of the contract.

4. The city has the right to make a contract for water supply for one year, provided it has in the treasury a sufficient sum to pay therefor, or if such sum can be secured by lawful taxation levied during the year in which the contract is made. While a contract for a longer period is illegal, yet where the other parties to such a contract have complied with their part, the city is liable for the amount stipulated in the contract for each year that it received the benefits thereof.

Complainant's Bill.

On May 1, 1899, less than two months after the decision of the Supreme Court, the Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Company, a Pennsylvania corporation, through the same counsel who had represented the waterworks company, filed a bill in the Circuit Court of the United States for the Fifth Circuit against the Dawson Waterworks Company, the city of Dawson, and certain individuals in their representative capacity as officers of said city. The bill alleged in substance as follows (pr. rec. 1):

> That on September 1, 1891, the Dawson Waterworks Company created complainant trustee for its first mortgage bonds, covering $40,000, the deed of trust conveying as security the real and personal property, rights, franchises, etc., and in particular the income payable to said company or to the trustee of its bondholders by virtue of the contract with the city of Dawson; that the bonds were dated September 1, 1891, and payable September 1, 1916, and had been sold to procure the money to construct the system of waterworks in the city of Dawson.
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> The contract contained in the ordinance of February 21, 1890, was alleged, cited, and described, as well as the election of 1886. That the water company had constructed a system of waterworks in accordance with the requirements of said contract; that the system had been tested and found to be satisfactory; that the city had, on August 12, 1891, by resolution, accepted the system as complying with

the contract; that the water company had continued to maintain and operate the system in compliance with the contract, and that the city had continuously enjoyed the fire protection provided thereby.

That it was understood by the city when it made the contract that the money required to construct the waterworks was to be procured in whole or in part by the issue of bonds of the water company, and to make them more salable the city had agreed to pay to the trustee for the bondholders the annual rental stipulated in the contract, thus inviting investors to purchase the bonds upon the faith that the city would observe its obligation.

That after using the water without complaint for several years the city council, on June 27, 1894, adopted a resolution declining to further carry out its contract, assigning as the reason therefor that the contract created an indebtedness forbidden by the constitution of the State, and was, therefore, not binding upon the city; that the water company had in no way failed to comply with its contract; that at the time the resolution was adopted the city was considering the purchase of the waterworks, and it was its purpose in repudiating the contract to destroy the value of the property by withdrawing the revenue necessary to its existence, thereby forcing the company to sell at such a price as would be satisfactory to the city; that in pursuance of this scheme an equitable petition was filed in the State court by certain taxpayers against the city and the water company, seeking to enjoin the city from paying the rentals accruing under the contract on the ground that the contract was void under the constitution and laws of Georgia. The petition was denied. It was charged that the suit was instituted at the instance of the city.

That since December 31, 1894, the city had refused to pay or make any provision for the payment of water rentals under the contract which it had prior to that time recognized; that in December, 1894, the city council, through its mayor, notified the water company that a resolution had been adopted declaring that the city would not be liable

on the contract after January 1, 1895; that the city had continuously, since January 1, 1895, availed itself of the fire protection afforded by the water system, thereby taking the benefits, though declining to carry out the obligations of the contract; that the public ordinances providing for the use of the water by the fire department had never been repealed, nor had the department been forbidden to use the water; that no other means of fire protection had been provided by the city; that apparatus had been furnished the city fire department for using the water, and members of the fire department were given tax exemptions in consideration of their services; that the mayor and members of the council, as well as other citizens, had subsequently assisted in the use of water at various fires.

That the water company declined to acquiesce in the repudiation of the contract by the city, and gave notice that it would continue to furnish water with the required pressure, for fire protection; that it had observed the requirements of the contract; that notwithstanding the water company had at all times held itself in readiness to furnish water for municipal buildings and fountains, the city had assessed and attempted to collect taxes for the year 1895.

That it was the purpose of the city to sell bonds and erect its own system of waterworks and dispense with the fire protection afforded under the existing contract; that it was the city's plan to repudiate the contract, but nevertheless to continue to use the water until such time as it should sell its bonds and erect its own waterworks; that the Supreme Court of Georgia having decided that the contract between the city and the water company was void, the city was engaged in an effort to sell its bonds for the purpose of erecting a system of waterworks in violation of its contract and in destruction of the rights of the water company and the holders of its bonds.

That the water company had no property except its plant and the value of said contract, the abrogation of which would result in almost complete destruction of the value of its property, as the company would be in no position to compete suc-

cessfully for the patronage of private consumers.

That the water company, recognizing complainant's duty to the bondholders, had (since the said decision of the Georgia Supreme Court) yielded to complainant's demand that in future it should have the exclusive right to collect from the city of Dawson all rentals accruing under the contract for the year 1896, and subsequent years, and the city had been notified thereof.

That the bonds of the water company had been first sold to the American Pipe Manufacturing Company, which in turn sold them in open market, and the same are now held by different persons; that said pipe manufacturing company is engaged in the construction of waterworks, and frequently receives payment in bonds, and consequently has frequent occasions to sell such bonds, and is therefore interested in seeing that the obligations thereof are duly protected; that said pipe manufacturing company had paid all the interest due on the bonds from January 1, 1896, to March 1, 1899, inclusive, as the water company could not do so, because of the failure of the city of Dawson to pay the rentals during said years; that said pipe manufacturing company was unwilling to advance further sums, and had called upon complainant, as trustee, to demand and collect the rentals from the city of Dawson, so as to enable the pipe manufacturing company to recover the interest advanced.

The bill prayed that the city be enjoined from erecting, operating, using, etc., any system of waterworks other than those of the water company for fire protection, or from entering into any other contract with reference to any other water system, or for supply of water for fire protection, or from selling bonds for any such purpose in violation of said contract with the Dawson Waterworks Company, and from collecting any city tax or license fees from said company. Also that the contract be declared valid and binding upon the parties, and that the same be specifically enforced, and that complainants recover all rentals due, with interest.

Defendants' Demurrer and Answer.

The court having granted a restraining order and rule *nisi*, the defendants for cause filed objections to the jurisdiction of the court, in substance as follows (pr. rec. 40, 51, 53, and 60):

That the Dawson Water Company, a Georgia corporation, was the real complainant in said bill, which was fraudulent and collusive, and filed since the rendition of the judgment by the Supreme Court of Georgia in the case of said water company *versus* the city of Dawson, declaring that the contract between the parties was void; that the bill was filed in the name of the present complainant, under the newly created right of action, for the purpose of avoiding the judgment of said Supreme Court, which was conclusive as to all questions raised; that under the allegations of the bill there was no jurisdiction.

Whereupon the defendants prayed that the court proceed no further, but dismiss the bill for want of jurisdiction.

For further cause defendants charged that there was no equity in the bill; that the only right of action alleged was one at law to recover rentals; that the allegations in the bill showed only a contract which was void, and had been declared so, and that there was no contract at all between complainant and defendants.

That the contract between the company and the city was void *ab initio*, because the city had no power to make such a contract as alleged; that on the 14th day of March, 1899, the Supreme Court of Georgia, in the case of the Dawson Water Company *vs.* the City of Dawson, in a suit for alleged rentals under said contract for the year 1895, had decided that under the constitution and laws of the State of Georgia, and its settled policy, this very contract was *ab initio* void.

Wherefore defendants said that all questions now raised by complainants were *res judicata*.

For answer defendants denied that the city had entered into the alleged contract with the full

knowledge and free assent of its inhabitants. They charged that the notice and resolution for the election on said water contract were void for uncertainty and had been so declared by the Supreme Court; that when said election was called and held, neither the said R. L. Bennett nor the waterworks company, nor said contract had ever been contemplated by the voters of the city or by its officials; that the votes at said election were cast in the belief that the city proposed either to build or buy waterworks; that the so-called contract with R. L. Bennett was undertaken without regard to said election and without any sanction by the electors of the city and without any opportunity of sanction by them.

They denied that the inhabitants of the city had accepted the contract as the act of the city, or that the same had been acquiesced in by every one; they charged that there had been objection to the contract from the beginning, which had grown with the experience of the people with said contract until it had ripened into litigation.

They admitted that the city had accepted the waterworks at the time as meeting the requirements of the contract, but charged that their fitness and efficiency was of short duration, while the contract required that they should be continuous; they denied that the waterworks company had carried out its contract since the acceptance of the system.

They admitted payment by the city of the rentals prior to the year 1895; they admitted renouncing the contract in June, 1894, as illegal and exorbitant, but alleged that the city was desirous of doing what was right by the water company, and just and best for the people of the city, and negotiated for a fair and legal contract with the company; that the company treated its overtures with ridicule; that since then the city had not recognized the contract, and that no official, as such, has used the water since January 1, 1895; they denied any effort to force the company to sell its system to the city.

They charged that the water system was and had been during all the years mentioned, defective, insufficient, unreliable and almost unserviceable as a

means for protecting the city from fire; that the required amount of pressure had not existed during this time; that the system had not been kept in proper condition, and that the works were and had been unsatisfactory and had almost entirely failed of results on occasions of fires; that the system was worse than worthless to the city, for instead of being a protection, its existence, and the litigation connected therewith, had prevented and was preventing the construction of adequate and sufficient works; that during all these years the company had notice and knowledge of the inefficiency of said system, and on one occasion, in June, 1897, after the system had failed to be of service in preventing the burning of the Whitehard and Green houses, by agreement several citizens and J. A. Horseley, superintendent of the system, the next day made a test, being furnished with 100 feet of new and clean hose and one inch nozzle, as provided by the contract, and the pressure failed to throw the water vertically in still air more than thirty feet; that in and since 1894 there had been no substantial deterioration or improvement in the system.

That the contract alleged for remission of taxes was void, and had been so declared by the Supreme Court of Georgia; that the city had not used the water under the terms of the so-called contract, and that the taxes assessed against the water company for 1895 and subsequent years were unpaid.

That the city had the right to build, or buy, and operate waterworks upon complying with the requirements of the State constitution.

That complainant had failed to assert any right to collect water rentals or to give notice to the city of its intention to do so, and had allowed the water company to collect the rentals prior to the year 1895, and to litigate for the rentals for said year as sole claimant thereof, until it had reached an adverse decision, when the Supreme Court of the State adjudged the contract null and void, and all questions now raised having been decided adversely, it was too late for complainant, as subsequent transferee, to litigate the same question in a different jurisdiction.

Defendants charged that the water company did not and could not, under the constitution and laws of Georgia, have such an exclusive franchise as alleged by complainant; that the city, its property owners and inhabitants, had been and were being greatly damaged by the existence of the present system and the continued litigation by the water company and its privy, the complainant; that according to complainant's bill, the water company was insolvent and could not improve and repair its system so as to satisfy the requirements of the city, and notwithstanding that fact, the said company, through complainant, was stubbornly insisting on the enforcement of the so-called contract, requiring exorbitant payments for next to worthless service.

Amendments to Bill and Answer.

The court heard the rule on June 9, 1899, and on June 27, 1899, before a decision was rendered, the complainant amended its bill, setting up a Federal question, and alleging in substance as follows (pr. rec. 36, 51):

That notwithstanding the bonds of the water company were marketed on the faith of said contract, and that the water system had been erected at great expense, and the company had complied with the conditions of the contract, the city had, by ordinance and conduct, attempted to impair the obligations of said contract and that its action was in destruction of the security of the bondholders under the contract, and protection thereof guaranteed by the Constitution of the United States; that the city had attempted to violate the obligation of said contract, contrary to the Constitution of the United States, which prohibits any State from passing any law impairing the obligations of contracts, and, under the color of authority given it by the charter, the city had not only adopted such ordinance, but was proceeding to carry the same into effect.

That the wrongful conduct of the city in refusing to be bound by the obligations of the contract, and to destroy without compensation the property values

dependent upon the exclusive franchise guarantee by said contract, and its threat to erect a rival system of waterworks, would have the effect of depriving the bondholders of their property without due process of law, contrary to the protection guaranteed by the Constitution of the United States.

That after the decision against it by the Supreme Court of Georgia, the water company had notified complainant that it would take no steps to collect the water rentals accruing after January 1, 1896, or looking to the enforcement of the contract and the protection of the bondholders, and that said company was without means to pay the instalments of interest and could not now make necessary repairs and improvements.

The defendants answered the foregoing amendment in substance as follows:

They denied the allegations of the bill as amended and reiterated that the suit was collusive and instituted to evade the decision of the State Supreme Court; that the water company had constantly demanded payment of the rentals in its own right, without notice or intimation that complainant had any right to collect the same; that upon the promulgation of the decision of the Supreme Court of Georgia, the waterworks company (who was the real complainant), and also the superintendent of the company, had declared that litigation had just begun, and they would now enforce their alleged rights in the United States courts.

That the water company had failed from the year 1895 to the year 1899, inclusive, to carry out its contract, and had left the property of the city of Dawson at the mercy of fires during all that period.

That the defendants had passed no ordinance in impairment of any valid contract, and had made no contract, and had done no act tending to destroy property without due compensation therefor; they admitted holding an election to authorize a bond issue, the proceeds of which would be applied to the erection of waterworks.

They denied any contractual relation with the complainant and admitted having never complained about the waterworks to the complainant, because the city never knew or suspected that it was the lawful guardian of the water company, and therefore entitled to notice.

The cause was heard, and thereupon, on September 16, 1899, the court granted an order for an injunction *pendente lite*, with leave to the defendants to apply to the court, after thirty days, for a test of the ability of the water company to perform its obligations under the contract. From this order the city prosecuted an appeal to the Circuit Court of Appeals, which court, without regard to the merits of the controversy, dismissed the appeal on the ground that an appeal would not lie to that court from an order granting an interlocutory injunction in a case involving the application of the Constitution of the United States (Dawson *vs.* Columbia Avenue, 102 Fed. 200).

On July 8, 1901, after argument, the circuit court overruled defendants' demurrer, holding the law and equity to be with the complainant.

On December 2, 1901, by consent, the cause was referred to W. A. Wimbish, Master in Chancery, to hear evidence and make report on all matters in issue. The material portions of the testimony will be referred to in the "Specification of Errors" and in the "Argument," *infra*.

REPORT OF THE MASTER.

The hearing took place in March and April, 1902. The complainant and the city of Dawson appeared and were represented by counsel, but there was no appearance for the water company. After argument the Master submitted his report, which was in substance as follows (pr. rec. 77):

Findings of Fact.

1. That the result of the election of June 11, 1886, was not in contemplation of the parties to the con-

tract made in 1890, between the city of Dawson and R. L. Bennett, and therefore constituted no authority for the city to enter into said contract; that the contract was made without reference to said election, and was not induced thereby.

2. That the contract was, in substance, *as stated, supra*, in this narrative, and the water company had become transferee thereof, as also stated.

3. That the city of Dawson had express notice that bonds were to be issued to construct the waterworks.

4. That the city designated and accepted the source of water supply.

5. That after completion the system was tested by the city, and by formal resolution was accepted as coming up to the requirements of the contract.

6. That the water company issued bonds aggregating $40,000, giving mortgage to complainant as trustee, as alleged in complainant's bill; that the issue of bonds was accepted by the American Pipe Manufacturing Company in payment for construction of the works; that the bonds were subsequently sold to bona fide purchasers at prices varying from 92½ to 100, the aggregate derived amounting to $37,927.23; that the waterworks, after acceptance by the city, were operated for several years to the mutual satisfaction of the parties, during which time the city paid the rentals as they fell due, and appears to have made no complaint either with reference to the quality or quantity of the water or the efficiency of the service; that in May, 1894, the city opened negotiations looking to the purchase of the system, and the result was a failure to agree; that on June 27, 1894, the city renounced the contract because *ultra vires*, and appointed a committee to make such arrangements as would be satisfactory to the city and the waterworks company; that the water company declined to acquiesce in the abrogation of the contract; that on December 14, 1894, the city notified the company that unless a new agreement was reached as to subsequent use of the water, it would not be liable under the contract after January 1, 1895; that the

water company declined to enter into a new agreement and notified the city that it would continue to perform the requirements of the contract; that in 1895 the company continued to furnish water for the use of the city; that the system of the company was only used at one fire during said year; that since that time the water had been used on occasions of numerous fires, and the city officials participated in the use of the water, claiming that they were not acting in their official capacity, but as private citizens in emergencies, their acts being unauthorized by the city; that the city fire department was maintained since 1894, as it had been in preceding years, and the city continued to furnish fire apparatus to the fire department, and to grant tax exemptions to the members thereof; that no other means of fire protection was afforded by the city, and it did not forbid the use of the water by the fire department and must have known that it was being used; that notwithstanding the repudiation of the contract, the city had continued to enjoy the fire protection afforded by the water company, as it did prior to repudiation.

8. (This finding relates to the quality of the water furnished, and is quoted in full in the specification of error No. 26, *infra*.)

9. (This finding relates to pressure, and is quoted in full in specification of error No. 26.)

10. That for three and a half years prior to the repudiation of the contract, the water supply was taken from the source designated and approved by the city, and during these years the surface washings flowed into the stream during times of rain, and on such occasions the water was muddy; that there was no requirement by the city for the water company to protect the water shed, nor was there any requirement that the water be filtered, or that the tower be increased in height or capacity; that the city predicated its right to renounce the contract upon the want of authority in the preceding administration to bind the city, and because it regarded the contract as unfair and exorbitant; that the evident purpose of the city was to either purchase the works at a

price satisfactory to it, or to make a new agreement on more favorable terms, or to construct and operate its own system; that, failing to agree with the company, the city proposed to issue bonds and construct its own *waterworks*.

11. That during the years succeeding 1895 the only water furnished by the company for municipal buildings was through one opening. No water was supplied for fountains, none having been maintained by the city.

12. That the city levied an *ad valorem* tax on the water company for the year 1895, but the tax had not been paid by the company.

13. That no application had been made by the city to test the water system, as provided by order of the court of September 16, 1899.

14. That subsequent to the date of the decision of the Supreme Court of Georgia, in the case of the Waterworks Company *vs.* City of Dawson, the company had assigned to complainant the exclusive right to demand and collect the water rentals.

15. That the revenues of the water company from and including the year 1895, exclusive of rentals claimed to be due by the city, had been insufficient to pay the operating expenses and fixed charges.

16. That the American Pipe Manufacturing Company had loaned to the water company from time to time funds to meet the accruing interest on the bonds of the water company, from September 1, 1895, to March 1, 1899, aggregating $8,560; that the water company had paid said interest to the complainant; that the transaction between the pipe company and the water company was merely a loan from the former to the latter, and there was no express agreement that the former should be subrogated to the rights of bondholders in the interest coupons.

17. That the complainant was without notice of litigation between the water company and the city of Dawson until after the decision of the Supreme Court of Georgia, dated March 14, 1899.

Conclusions of Law by the Master.

I.

That the only effect of the transfer by the water company to complainant of the right to collect the rentals, in so far as concerns the want of jurisdiction, was to create the diversity of citizenship necessary to a suit in the Federal court; but since in this case a Federal question sufficient to independently sustain the jurisdiction was presented, it was immaterial to inquire what motive prompted the water company to make the assignment to complainant; that the court, in overruling defendants' demurrer for want of equity, adjudicated the right of complainant to maintain its suit.

II.

1. That the plea of *res judicata* had no application because complainant was not privy in right and estate to the water company in the State court suit as to be conclusively bound thereby, since a mortgagee is privy in estate to a mortgagor only as to the actions begun before the mortgage was given.

2. That this court was not bound to follow the decision of the Supreme Court of Georgia, declaring the contract in question to be void, because a debt was thereby incurred within the inhibition of the State constitution, but should exercise its independent judgment in regard to the contract, because there had not been such a settled course of judicial decisions in Georgia, on the question, at the time of the making of the contract as to constrain the courts of the United States to follow the later decisions of the State court. (In reaching this conclusion the various decisions of the Supreme Court of Georgia on the question of inhibited indebtedness were cited and construed, the Master disagreeing with the conclusion of the Supreme Court in Dawson Water Company *vs.* City of Dawson, as to the force, effect, and consistency of the various decisions of said court, rendered prior to the date of the contract in question. The Master's analysis will be considered in the argument which is to follow, under "Stare Decisis."

3. That, contrary to the decision of the Supreme Court of Georgia, he found that the contract in question did not create a debt within the meaning of the State constitution, and that the question was not an open one in this forum, citing the case of Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 1, as conclusive; that the contract contemplated that the water company should maintain and perform specified service for a period of twenty years, and the city was obligated to pay $2,000 per annum for the service; that if the water company should fail to perform the service, the city would be under no obligation to pay; that in no event was it liable to pay any instalment for service until the service had been rendered.

4. That the grant of franchise to the water company was in consideration of the performance of a public service, and after performance by the grantee became a contract protected by the Constitution of the United States; that as an incident to the principal undertaking the city had power to grant to the company the use of its streets and the exclusive right to supply the city and its inhabitants with water; that while the contract did not in terms express an agreement that the city would not, during the twenty years it contracted to take water, erect its own system for the purpose of supplying the inhabitants with water, yet such was the fair implication and reasonable intendment of the contract; that it was unnecessary to decide whether the grant of the exclusive franchise for ninety-nine years was valid; that the city, having induced the expenditure of money on the face of the promise that it would grant the exclusive use of the streets for pipes and mains by the water company, and having contracted to pay for the use of the water for fire protection for twenty years, would not be permitted in equity to disregard its agreement by entering into competition with the water company before the expiration of the contractual term.

5. That during periods of continuous rainfall the water supply was muddy and to some extent contaminated by surface washings; that at times the reservoir leaked, and the required pressure was not

at all times maintained; that the quality of the water was the same as it had been during the years the city accepted it as satisfactory; that the water shed and its condition was substantially the same then as now; that the contract did not require the water to be other than that furnished in its natural state from the designated source of supply; or that it should be filtered or otherwise rendered fit for domestic use; that prior to the repudiation of the contract no complaint as to the pressure or quality of the water had been made, nor had objection of any kind been presented; that no complaint had been made until the filing of defendants' answer, and within a reasonable time thereafter the company erected a new standpipe of larger capacity and greater pressure; that, under the circumstances, the city could not invoke a forfeiture, nor plead the facts as a defense to the right of complainant to relief.

6. That the agreement between the city and the water company, which provided for commutation of city taxes in consideration of water to be furnished for municipal buildings and public fountains, was void under the constitution and laws of Georgia, but that the water company, upon an accounting, would be entitled to have credit for the value of the water actually supplied under the agreement.

7. That the interest which matured from September 1, 1895, to March 1, 1899, was paid by the water company from funds loaned to it for the purpose by the American Pipe Manufacturing Company, and the interest having been so paid, the complainant was not entitled to recover in behalf of the pipe company, the indebtedness represented by the coupons having been extinguished; that the complainant, having once received payment, can not enforce it again in the interest of the pipe company, who was not a party to the contract and was not in privity with complainant.

8. That, under the Constitution and laws of the United States, the ordinance of the city denying liability on the contract with the water company was legislation affecting the obligation of the contract; that the voters of the city, having authorized the

issue of bonds for the construction of waterworks to be operated by the city, the complainant was entitled to equitable relief to prevent impairment of its rights under the contract; that the contract was an essential part of the security of the bondholders, the right of the complainant to collect the water rentals in default of payment of interest by the water company being confirmed in the mortgage given to secure the bonds, and the exclusive right to make such collections having been assigned, after default, to complainant; that complainant was entitled to an injunction forbidding the city from constructing or operating a system of waterworks in competition with those of the company, or for the purpose of supplying the city with water for fire protection and municipal use; that since it appears that the water company owns no property other than that covered by the mortgage to the trustee, so that a suit for damages against it would not measure up to the standard of an adequate legal remedy, the complainant is also entitled to a mandatory injunction requiring the city and the water company to perform the contract as essential to the protection of the security for the bonds.

General Conclusions of the Master.

1. That the objection to the jurisdiction was not well founded, inasmuch as the jurisdiction rested upon the Federal question presented, without regard to the citizenship of the parties.

2. That the doctrine of *res judicata* was not applicable to the complainant for the reason that complainant was not a party or privy to the State court suit.

3. That this court is not bound to follow the decisions of the Supreme Court of Georgia, rendered after the contract had been made and the rights of complainant thereunder acquired; that the decisions of the State courts, prior to the execution of the contract, had not been so long and firmly established as to constitute a rule of property.

4. That the contract between the city and the com-

pany did not create a debt within the meaning of the constitution and laws of Georgia, and that the same was valid and enforceable.

5. That the exclusive franchise granted by the city to the water company could not be revoked by the city in its own interest, nor could its value be impaired by competition on the part of the city within the twenty years during which the city agreed to take and pay for water for fire protection.

6. That the city could not forfeit the rights and franchises of the water company for inefficient service or for failure to supply water of a higher quality or purity, nor could it plead such facts in bar to the equitable relief sought.

7. That the agreement to accept water for use in commutation of city taxes was void under the laws of Georgia.

8. That complainant was not entitled to enforce in this suit any rights that the American Pipe Manufacturing Company may have acquired by reason of having furnished the water company with funds to pay maturing interest coupons on its bonds.

Relief Recommended by the Master.

1. That the contract between the city and the water company be declared to be valid, binding, and enforceable.

2. That an injunction be granted complainant prohibiting the city from negotiating or disposing of the bonds authorized to be used to construct a water system by the city, and from constructing or operating any water system in the city of Dawson for supplying either the city or its inhabitants with water for fire protection or domestic use.

3. That the city be enjoined from revoking or attempting to revoke the rights and franchises granted to the water company during the term of twenty years, within which it contracted to take and pay for the water.

4. That the city should pay complainant the water rentals from January 1, 1896, with interest on each

instalment thereof as the same matured, at the legal rate.

5. That an accounting be had between the parties to the suit to ascertain what is due by the city for water furnished by the water company under the agreement made in commutation of taxes, and the value of the water so supplied should be allowed as a credit against the demand of the city for *ad valorem* taxes on the property of the water company; that until such accounting be had, and until the city pay over the amount found to be due for water, the city be enjoined from proceeding with the collection of the taxes until such accounting and settlement.

6. That the city and the water company be required to specifically perform the contract forming the subject of this suit, and to that end a mandatory injunction be issued.

The Master made report on April 27, 1903, and the city filed exceptions thereto. The court overruled all the exceptions and rendered final degree on August 3, 1903 (pr. rec. 166). The report was confirmed in all respects, the decree being framed to measure the recommendations of the Master. An appeal brings the case before this court.

SPECIFICATION OF ERRORS.

It is assigned that the court below erred (see pr. rec. 175–219):

1. In not dismissing complainant's bill for want of jurisdiction, because under the pleadings there was no diversity of citizenship, the water company, the real complainant, and the city, the defendant, both being Georgia corporations, the assignment of the cause of action to the nominal complainant being ficticious, merely colorable, and without interest, and for the purpose of conferring Federal jurisdiction.

2. In overruling defendants' demurrer to the jurisdiction, because there was no Federal question presented, the city having passed no law impairing the obligations of the con-

tract with the water company, and having taken no action tending to deprive the bondholders of the water company of their property without due process of law.

3. In not dismissing said bill for want of jurisdiction, because under the pleadings there was no Federal question involved or other ground of jurisdiction, the alleged Federal question being predicated upon an alleged contract such as was expressly forbidden by the constitution of Georgia.

4. In not dismissing said bill for want of jurisdiction, because (1) there was no equity therein, the only right of action set up being a common law right, and only enforceable as such; (2) there was no contract or facts set forth to sustain equitable jurisdiction; (3) the alleged right of recovery was one for water rents, which could only be determined in a proceeding at law; and (4) the only right set up requiring equitable remedy to protect, namely, the exclusive franchise in favor of the water company, if such as alleged, could not exist under the constitution of Georgia.

5. In not dismissing said bill for want of jurisdiction, because complainant had an adequate and complete remedy at law, it appearing from the pleadings that equitable jurisdiction was solely invoked to protect from impairment an alleged exclusive franchise such as the city of Dawson never conferred and never had the power to grant.

6. In entering said decree, because all questions and issues raised by the bill were *res judicata*, the appellants having set forth in their answer that on the 14th day of March, 1899, the Supreme Court of Georgia, in a suit for rentals for the year 1895, by the Dawson Waterworks Company *vs.* the City of Dawson, under the very contract forming the subject of the present suit, decided and adjudged that under the constitution and laws of Georgia, and its settled policy, said contract was void *ab initio*, these appellants then and now contending that by said judgment, and the proof thereof which was duly presented, the complainant was estopped and concluded, as well as the water company,

its interest being identical with that of the water company, the water company being the real complainant and not a defendant as pretended, the suit being collusive and fictitious for the purpose of avoiding said judgment, the nominal complainant having become the assignee of the cause of action since the date of said judgment.

7. In entering said decree adjudging that complainant recover of the city of Dawson the sum of the water rentals accruing since 1895, because the contract between the city and the company was only operative from year to year until renounced, and having been declared so by the Supreme Court of Georgia, the highest court for the construction of the laws of said State, the Federal court was in duty bound to follow the decision of said court.

8. In entering said decree adjudging the recovery prayed for, because the court should have followed the decision of said Supreme Court which declared that the contract was void, said decision being declaratory of a rule of property which had already been established by said court in various decisions rendered prior and subsequent to the date of the contract between the city and the said company, said State court having never made any decision previous to said date in conflict with its determination of any material issue decided in the case of Dawson Waterworks Company *vs.* the City of Dawson.

9. In adjudging the contract between the city and the water company to be valid, binding, and enforceable, and that the ordinances and conduct of the city, whereby it was sought to invalidate said contract, were unconstitutional, as seeking to impair the obligation of said contract, because the city says that under the pleadings, evidence, and law, the obligation of the contract alleged and adjudged to be impaired, did not exist, namely, the alleged grant of an exclusive franchise by the city to the water company.

10. In enjoining the city from erecting any system of waterworks to supply water for fire protection or to furnish

the inhabitants of said city with water for domestic, sanitary, and other purposes, or from contracting with any person for the construction, operation, or use of any water system, or for water for fire protection or other municipal purposes, or from laying water mains in the streets of said city, etc., because such decree could be lawfully granted only on the ground that the water company had acquired in its grant an exclusive franchise to construct, maintain, own, and operate its works in the city, such as the municipal corporation had no power under its charter or otherwise to confer.

11. In entering such decree against the city, because the sworn answers of the defendants and the weight of the evidence adduced at the hearing showed that the inhabitants of the city were greatly in need of a sufficient supply of water for fire protection and for domestic, sanitary, and other useful purposes, it being the right and the imperative duty of said municipal corporation to provide such supply of water, which had not been and was not being furnished by the water company, and not within the ability of the existing system to furnish it.

12. In enjoining the city from erecting waterworks of its own and from using the streets for distributing the water, because under the pleadings, the evidence and the law of contract obligation, and as a matter of fact the city never made any agreement, valid or invalid, not to erect waterworks of its own and use its streets for the purpose of distributing water, and under its charter and the State constitution it could not have made any such valid agreement.

13. In entering said decree, because under the pleadings the former officers of the city, the waterworks company, and the complainant, had no power, by contract or otherwise, to deprive the inhabitants of said municipality of their right under the law to a suitable supply of water and from a competitive source if need be.

14. In granting said decree, because the alleged perform-

ance of said contract by the water company was denied in the sworn answers of defendants, and the evidence adduced at the hearing showed that said company had failed during the years for which rentals were claimed, namely, 1896, 1897, 1898, and 1899, to the date of the filing of the bill, to perform the alleged contract so as to be entitled to receive the rentals claimed to be due.

15. In adjudging that complainant recover of the city the water rentals accruing since January 1, 1896, because it did not appear from the evidence or otherwise that said rentals had been earned by the water company by performance of its alleged contract.

16. In enjoining the city from levying and enforcing, in violation of said contract, the collection of any city tax or license fee against the property of the water company, stipulated in said contract to be paid in water, because the court having found the agreement providing for such commutation to be void, it was unlawful for it to arrest the levy and process of collection of taxes and license fees.

17. In adjudging that complainant recover future instalments of water rentals during the life of the alleged contract, because the right of recovery of such instalments would depend upon the performance by the water company of its part of the contract, it being in contravention of law to decree recovery in advance of performance, and before the instalments could be due, in event of performance.

18. In adjudging, at the instance of a third party with no duties to perform, that the city and the water company be required to specifically perform the contract between them and to comply with their respective obligations arising and to arise thereunder, and that to such end an injunction be issued requiring specific performance, because the remedy of specific performance can not be properly so invoked, and as thus applied is not justified by the terms of the contract and the law applicable thereto.

19. In taxing this defendant with the compensation of

the Special Master, because no good reason appears why the city should bear the entire burden of the litigation.

20. In allowing the sum of $2,000 as compensation to the Master, because such amount is excessive when measured with the service performed.

(Overruled Exceptions to Master's Report.)

21. In overruling the first exception of law, which was as follows (pr. rec. 130–5):

By numerous witnesses the city proposed to prove by what occurred at various fires that the waterworks, as constructed and operated, did not come up to the requirements of the contract as to pressure. The testimony offered is briefed as follows:

> By *A. J. Baldwin* (pr. rec. 515): That at the fires that destroyed the residences of F. L. Parks, one in the year 1898 and one in the year 1899, the hose was attached to the plugs of the Dawson Waterworks Company, not over 400 feet away, on one of the principal streets of the city, and the force from the same was not sufficient to do anything towards extinguishing the said fires; and the building in each instance was burned down; that the force of pressure from said hydrants was so weak that those trying to throw the water on the fire could not get near enough to throw the streams on the fire, although they did stand within 40 or 50 feet of the building.
>
> That witness witnessed the fire that destroyed the Dawson Oil Mill, in Dawson, on the 4th of January, 1899. The mill was in full operation and supplied with 200 feet of standard hose, same kind and size of nozzle as the city's hose. This hose was immediately attached to the Dawson Waterworks Company's hydrant, 15 feet from the corner of said mill, by the hands, and turned on said fire. The pressure of said water was so weak it was entirely insufficient to prevent the burning of said building, although attached and put to work very promptly, and in consequence of said weak pressure thus used, those using the hose were unable to stay near enough to the fire to throw

water on it. That the pressure at the time was not sufficient to throw the water over 30 feet high with a one-inch nozzle attached to the hose. The mill was on one of the principal streets of the city and one of the lowest points, being ten feet lower than the base of the standpipe of the waterworks company.

Witness saw the fire which destroyed the Farnum House, in April, 1898, being near his place of business. Fire caught in kitchen, low one-story building, not more than fifteen or twenty feet high, and the streams of water from the waterworks did not and could not reach more than 25 feet high on that occasion. Don't know whether the nozzle was ¾ or one inch, but it was one or the other. On this occasion witness was hit by the stream of water with its full pressure in the face while standing within eight feet of the nozzle and suffered no inconvenience from it, except slight strangulation. At the time this happened the nozzle was not more than about 50 feet from the plug. Witness can not state the length of the hose. Witness could not state positively what the length of the hose was. It was probably 150 feet. Eight buildings were destroyed on this occasion, and the fire was never checked until the people were able to get the steam fire engine belonging to said city at work, when the flames were subdued by said engine. That from his own experience with fires, he knows that a pressure equal to that agreed to be furnished by the Dawson Waterworks Company, viz, 50 feet vertically in still air, this fire could have been extinguished with the apparatus then in hand and with the hose being used, with slight damage to the hotel and kitchen. Witness was at the fire that destroyed the J. R. Smith residence, May 1, 1899. The plug to which the hose was attached at said fire was about 400 feet from said residence, and the pressure was not sufficient to throw the stream over a chimney 26 feet 4 inches high. Witness measured the chimney and saw the failure.

By *J. S. Lowry* (pr. rec. 516): That after the hose was attached to the hydrants of the waterworks company on one of the principal streets of the city, when an effort was made to extinguish the Farnum house

fire, the water could be thrown barely to the top of the kitchen, one-story part of the building, not over 22 or 23 feet high.

By *F. M. Jennings* (pr. rec. 516): As to the dry kiln fire in 1899, that the stream was never over 25 feet high; and that at the Grier residence, consumed in 1898, the pressure was not sufficient to throw the water on a servant's house in the yard, not more than 20 or 25 feet high; and that he saw a man carry the nozzle nearly to the top of said house and pour the water from it. It would not have thrown a stream. Also the Parks fire in 1899, the pressure was not sufficient to throw a stream to the top of the house, it not being more than 30 feet high. And also substantially the same as to the oil mill fire.

By *A. M. Raines* (pr. rec. 516): That at the oil mill fire the pressure was so weak that in order for witness to throw the water on the end of the stable, which was adjoining said property, and it was not more than fifteen feet high, witness was compelled to put the end of his thumb over the nozzle so as to make it squirt a small stream on said stable and keep it from catching fire from the heat of the other fires. That said property was on one of the principal streets of the city. Witness was at the Parks fire, and in order to prevent the building on the opposite side of the street from catching fire it was necessary to go on top of the veranda so as to be able to throw the water from the hose on the roof of said building, which was a one-story building not more than 20 feet high.

By *E. L. Rainey* (pr. rec. 516): That the stream at the Grier fire in 1898 could not be thrown to the top of a one-story frame house not more than 20 feet high. That at the Parks fire the stream could not be thrown more than 15 feet high; and that it was necessary to get the water on top of the house, 24 feet high, to carry the nozzle to the place where needed and let the water pour out.

By *A. J. Carver* (pr. rec. 517): That when the Farnum house burned in 1898, he noticed that the pressure from the hydrants of the waterworks company was very poor and inadequate at first, but that

later the pressure was very much better. The cause of this improvement witness is not able to state, as the city's fire engine was soon put in operation and the water pumped from the cisterns of the city, as well as from the hydrants.

By *Charles Deubler* (pr. rec. 517): As to the Baldwin & Company and Geise dry-kiln fire in 1896, that the pressure was wholly insufficient to throw a stream more than 25 feet high; that at the Variety Works fire the pressure was lacking and the fire engine had to be called into requisition to accomplish anything.

By *J. R. Mercer* (pr. rec. 517): That at the Parks fire in 1899 the pressure from the hydrants was so inadequate the holder of the nozzle had to get on top of an adjacent building in order to get water there, and that the water could not be thrown more than 30 feet high.

By *W. F. Locke* (pr. rec. 517): That at the Whitchard fire in June, 1897, the waterworks company's hydrants were insufficient to throw water 20 feet away from the nozzle.

By *F. E. Clark* (pr. rec. 517): That he attended the fire which burned the residence of Robert Smith in Dawson in 1899, and that the pressure was not sufficient to throw a stream over a chimney about 25 feet high at said fire.

By *T. L. Guerry* (pr. rec. 517): That he was at the Bob Smith fire in May, 1899; that there were about 200 feet of hose attached to the hydrant, and there was not enough pressure to get the water on top of a chimney 25 feet high.

By *C. V. Evarts* (pr. rec. 517): That he attended the fire which burned the residence of Mr. Hamilton, September 20, 1898, in Dawson; that 400 feet of hose were used. Fire was within 400 feet of the pumping station of the Dawson Waterworks Company, said county (Terrell), the hose being attached to a plug of said company, and the water could not be gotten from the nozzle to the top of the veranda, 12 feet high.

By *W. E. Riordan* (pr. rec. 517): That he was present at the lumber kiln fire in Dawson in 1896, and that the pressure of the water from the hydrants of the

waterworks company was not sufficient, during his observation, to throw the water ten feet from the nozzle.

The Master ruled as follows (pr. rec 514, 517):

The question now under consideration is not the effect of this evidence, but its relevancy to the extent of making it admissible. Should the Master err in excluding testimony, the result would be to put the parties to additional expense, cost, and delay; and for that reason I am liberal in my views, that is, I try to be, as to the admissibility of the testimony. Nevertheless, if I am clear that testimony is not relevant, and should not be admitted, I feel I should not admit it.

Now the contract in this case provides for the construction of a system according to the specifications given, and that there should be erected a reservoir of a certain capacity, and of such a height as to afford a pressure under the circumstances stated in the ordinance. As to the system, it is provided that the system shall be thorough and complete and that a supply of water for the purposes stated shall be maintained. I think that imposed on the waterworks company the duty of maintaining an efficient system of keeping a sufficient supply of water on hand.

Now any evidence showing that this reservoir was not of the required height would be entirely admissible. Any evidence showing that under the test provided in this contract, or under conditions substantially the same, showing that the contract was not complied with, I think would be admissible. I shall permit you to prove that the tank leaked. You may introduce evidence to show, if you choose and can, that the tank was not kept filled with water. You may also introduce evidence to show, if you can, under these conditions, or conditions substantially like these, that the pressure was not sufficient to raise the water 50 feet vertically, in still air. I shall permit you to show that there was a total failure of pressure for a greater or less length of time; and if the failure is total, then there is no pressure.

I hardly think we can go into the realm of speculation as to what the pressure would be under conditions which vary substantially and materially from these laid down in the ordinance. In other words, whether the water pressure was weak and continued so for a short length of time under conditions that surrounded the lumber kiln fire.

I hardly see how that illustrates the issue at all. I will permit you to introduce evidence to show that the company has not in any respect maintained its system as it should have done. As I have admitted evidence to show that there was a new tank made, I will admit evidence showing that the tank leaked. You may show that the pipes throughout the city were not properly maintained or flushed; and that the source of supply has been allowed to be contaminated; and that the service was improper. I will permit all that; but I don't think I should permit evidence as to what occurred at particular fires under conditions totally dissimilar from those stated in the contract.

Mr. Guerry: Your Honor's ruling, as I understand it, I would like to show in the record, as invoked upon the offer to prove certain facts, which I have stated, by these particular witnesses, your Honor rules I can not prove.

The Master: You stated that you expected to prove?

Mr. Guerry: By way of illustration.

The Master: In conformity with my general ruling I will exclude the evidence offered, unless it is proposed to show in connection therewith that there was a total failure of pressure, or that the surrounding circumstances were substantially the same as those laid down in the contract for a test. If you can come up to these conditions you may proceed.

The city says that the rejection of the proposed evidence was a material error of law on a vital issue in the case, viz: whether the system of waterworks, as constructed and operated, came up to the requirements of the contract as to pressure, the same being relevant and otherwise competent,

and the city insists upon a reopening of the case so that this testimony may be heard, considered, and given due effect, together with such other testimony of the same character as the witnesses would give upon re-examination in connection with that already reported on the same issue.

22. In overruling the second exception of law, which was as follows (pr. rec. 135):

The city says that the two principal issues of facts arising under the law and actually made by the pleadings were (1) whether the waterworks company had performed its contract as to pressure, both in the construction of its system and in its service, and (2) whether it had performed its contract in the kind of water supplied, and that the Master erred in failing and refusing to decide both of these questions.

23. In overruling the third exception of law, which was as follows (pr. rec. 135):

The city submits that a material issue arising under the law and actually made by the pleadings was whether the water company performed its contract as to pressure, both in construction of its system and in its service, and the Master failed and refused to make any findings upon this issue, and that by such failure and refusal he committed an error of law.

24. In overruling the fourth exception of law, which was as follows (pr. rec. 135):

The city submits that a material issue arising under the law and actually made by the pleadings was whether the waterworks company had performed its contract in the kind of water supplied, and the Master failed and refused to make any finding upon this issue, and that he by such failure and refusal committed an error of law.

25. In overruling the fifth exception of law, which was as follows (pr. rec. 135):

That the Master erred in law in finding against the city, and in recommending the relief as granted or any recovery

by complainant, because the right to relief and recovery depended upon the performance by the waterworks company of its contract as to pressure, both in construction of its system and in service, and upon performance of its contract to supply water suitable for domestic, sanitary, and other useful purposes, there being no finding by the Master that the company had performed its contract in either particular, he having failed and refused to find in favor of such performance.

26. In overruling the sixth exception of law, which was as follows (pr. rec. 136):

That the Master erred in finding and recommending that an injunction be granted complainant against the city; that the city pay the complainant the water rentals due and unpaid from January 1, 1896, with interest, and that the city be required to specifically perform the contract forming the subject of the suit, when under the law and pleadings there was no right of recovery or relief without performance by the water company of its contract to continue during the existence of the contract to furnish a sufficient supply of water to produce such a pressure in the mains that from any hydrant located on the principal streets a stream of water would be projected 50 feet vertically in still air through 100 feet of fire hose, with one-inch nozzle attached, and to supply the city and its inhabitants with water suitable for domestic, sanitary, and other useful purposes, the Master having not found that said contract had been performed, but having found, in effect, on the contrary, that the same had not been performed in his findings of fact, as follows (pr. rec. 90):

VIII.

"The source of water supply adopted by the water company from among those designated by the city consisted of a running stream, into which directly flowed the water of what is known as Dunn's Spring, some four hundred yards above the take-in of the

water company. These waters were among those analyzed by the State chemist, and by him pronounced safe and pure. The water shed does not cover an extended area. The stream above flows through land which is more or less marshy, and upon which there is considerable vegetable growth. The surface water from adjoining hills on one side of the stream flows in above the point of supply. On the crest of these hills are several small residences, the washings from whose premises flow into the stream. There is also on the water shed a scaffold, which has been used from time to time for the slaughtering of cattle in a small way. The stream from which the water supply is derived is not protected from these surface washings by means of dikes or other devices. The condition of the water shed is substantially the same now as it was at the time of the selection and as it has been since. The evidence does not disclose when the slaughtering of cattle began, or how extended it has been. The water is not filtered, but taken directly from the stream and pumped to a stand pipe or reservoir in the city, from which it is distributed by gravitation through mains and pipes to consumers.

"I find from the evidence that at certain seasons of the year the water is safe and pure, as shown by the analysis of the State chemist; at other seasons, during periods of continuous rainfall, the water is muddy and must to some extent be contaminated by reason of the surface washings from the water shed as described. It was disclosed in the evidence that an analysis of the water had been made at the instance of the city or some of its citizens, but this analysis was not offered in evidence, nor was any expert evidence as to the quality of the water introduced, excepting the analysis of the State chemist as above referred to.

"The general assembly of the State of Georgia passed an act, approved September 7, 1891, for the protection of the water supply of the waterworks for the city of Dawson. By this act it was made unlawful to obstruct or interfere with the flow of the stream, or pollute or contaminate in any way or by

any means the water of the stream or water shed, so as to effect in any degree the quality or purity of the water. It was made unlawful to place or deposit any dead animal or vegetable matter in the swamp bordering on and surrounding the stream, its springs and branches, so as to effect the purity and quality of the water. The violation of these provisions was declared to be a misdemeanor. The police supervision of the marshal and policemen of the city of Dawson was extended over the water shed, and the officers were empowered to make arrests therein for violation of the provisions of the act. The ordinance of the city of Dawson made it the duty of the mayor to appoint three members of the council, whose duty it should be to superintend the waterworks and water supply of the city, and to see that the owners of the waterworks company complied with their obligations in furnishing water to said city and private individuals (City Code, paragraph 242).

IX.

"The water company erected a reservoir exceeding in capacity that required by the contract. The height of this reservoir from its bottom to the surface of the earth below was 65 feet. Upon a test by the city it was ascertained and declared that the system met with the requirements of the contract, and I therefore find that the reservoir was of the prescribed height and capacity. Much evidence was introduced and offered to show that sufficient pressure had not constantly been maintained. It appears that on one occasion the reservoir was found to be empty, but this occurred shortly after the construction of the waterworks and before the repudiation of the contract by the city, and is therefore not material to be considered in the present case. At times the reservoir leaked. On one occasion the local superintendent of the water company tested the pressure from a point on what is known as an end pipe. The water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent without notice to the officers and

owners of the waterworks company or to the city. Gauges indicating the height of the water in the standpipe, and the consequent pressure, were placed at the pumping station of the water company and also in the engine house of the city fire department. Excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the required pressure. No complaint concerning the character of the service or the amount of the pressure was made to the water company until after the institution of the present suit. The water company has since erected a new reservoir of more than double the capacity required in the contract and of a greater height than the first reservoir. Since the erection of this new reservoir there has been no complaint or question as to the pressure."

27. In overruling the seventh exception of law, which was as follows (pr. rec. 137):

That the Master erred in his first conclusion of law (pr. rec. 94) in finding that the court had jurisdiction of the cause on the ground that a Federal question was involved, because such question depended upon the existence of an exclusive franchise which did not exist.

28. In overruling the eighth exception of law, which was as follows (pr. rec. 137):

That the Master erred in his first conclusion of law (pr. rec. 94) in finding that there was equity in complainant's bill, because there was no equity in said bill, and the complainant had an adequate and complete remedy at law.

29. In overruling the ninth exception of law, which was as follows (pr. rec. 138):

That the Master erred in his second conclusion of law (subd. 1, pr. rec. 95) in finding in favor of complainant upon the question of *res judicata* raised in the city's answer, the city having pleaded that prior to the filing of said bill the Supreme Court of Georgia, in the case of the Dawson Waterworks Company *vs.* the City of Dawson, had adjudged the contract sued on in said bill to be void *ab initio*, and that

complainant was mere privy and assignee of the cause of action involved in the decision of said Supreme Court and had become such since said decision was rendered, and that all the issues made by said bill were *res judicata* as to complainant as well as to the water company, the facts so pleaded having been duly proved.

30. In overruling the tenth exception of law, which was as follows (pr. rec. 138):

That the Master erred in his said second conclusion of law (subd. 1, pr. rec. 95) in finding that complainant was not a privy of the waterworks company as to the suit in the said court so as to be conclusively bound thereby, and that the doctrine of *res judicata* did not apply to it, notwithstanding, and in face of the fact, that it appeared from the pleadings that complainant had become assignee of the cause of action subsequent to the rendition of the decision of the State Supreme Court.

31. In overruling the eleventh exception of law, which was as follows (pr. rec. 138):

That the Master erred in his second conclusion of law (subd. 2, pr. rec. 96) in finding that the contract sued on was valid, notwithstanding the Supreme Court of Georgia had repeatedly held that such contracts were void, and in holding that the Federal court was not bound to follow the decision of the Supreme Court of said State as to the validity of the contract in question, because the city says that under the law of the United States and the decisions of the Supreme Court of the United States, it was the bounden duty of the Federal court to follow the decision of the Supreme Court of the State, rendered in construing the constitution of the State, and the contract made in said State and governed by its constitution and laws, because it appeared from the decisions of the Supreme Court of Georgia that said court had never made any decision contrary to its decision in the case of the Dawson Waterworks Company *vs.* the City of Dawson.

32. In overruling the twelfth exception of law, which was as follows (pr. rec. 138):

That the Master erred in his second conclusion of law (subd. 3, pr. rec. 103) in finding that the contract in question did not create a debt within the meaning of the Georgia constitution, because prior to the filing of the bill the Supreme Court of Georgia had decided in numerous cases that such contracts did incur such debts.

33. In overruling the thirteenth exception of law, which was as follows (pr. rec. 139):

That the Master erred in his second conclusion of law (subd. 4, pr. rec. 106) in finding that the water company had an exclusive franchise to occupy the streets and maintain a water system in said city by virtue of said contract, because, under the laws of Georgia, no such franchise could be granted by the city, no such power having been delegated to it by charter or otherwise.

34. In overruling the fourteenth exception of law, which was as follows (pr. rec. 139):

That the Master erred in his second conclusion of law (subd. 4, pr. rec. 106) in finding that the city after making the contract had no right to establish and maintain a water system of its own, or use the streets of the city, in competition with the water company during the life of said contract, because the city says that such construction of the contract made the same the grant of an exclusive franchise by the city to the water company, which grant the city had no power to make, from its charter or otherwise, and because that if the city had no power to make such a grant it had no power to estop itself from denying that it had made the same.

35. In overruling the fifteenth exception of law, which was as follows (pr. rec. 139):

That the Master erred in his second conclusion of law (subd. 5, pr. rec. 107) in finding that there was no requirement in the contract that the quality of water should be

other than that taken in its natural state from the source of supply designated and accepted by the city, because the city says that the contract required the water supply to be suitable for domestic, sanitary, and other useful purposes, and it was the duty of the water company, under the contract, to supply such water. The city submits that to test the water at a time when it was suitable for the objects required, and afterwards allow it to become otherwise, and to supply it to the citizens when wholly unfit simply because it had been accepted when fit, would not only be a violation of the contract, but a gross fraud upon the citizens and the city.

36. In overruling the sixteenth exception of law, which was as follows (pr. rec. 140):

That the Master erred in his second conclusion of law (subd. 5, pr. rec. 108) in finding that the city could not invoke a forfeiture or plead that the water supplied was not fit for domestic, sanitary, or other useful purposes, as a defense to the right of complainant to relief, because the city says that before the complainant can rightfully recover, the water company must have performed its contract in this particular, and have proved such performance, since complainant's right of recovery and relief is based by the bill upon the alleged performance by the company, which was denied by the city.

37. In overruling the seventeenth exception of law, which was as follows (pr. rec. 140):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that complainant was entitled to an injunction forbidding the city to construct or maintain waterworks of its own in competition with those of the company, because such injunction could issue only upon the ground that the water company had an exclusive franchise to the streets of said city for such purpose, when such franchise could not lawfully exist in the State of Georgia.

38. In overruling the eighteenth exception of law, which was as follows (pr. rec. 140):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that complainant was entitled to a mandatory injunction requiring the city and the water company to specifically perform the contract as essential to the protection of the security for the bonds, because the city says (1) that said contract is void; (2) that prior to the filing of the bill the Supreme Court of Georgia had declared the same to be void, and (3) that the complainant is bound by the decision of said court as privy, it being shown by the proof and found by the Master that its right to sue was acquired subsequent to the rendition of said decision.

39. In overruling the nineteenth exception of law, which was as follows (pr. rec. 141):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that the city and the water company should be required to specifically perform said contract because the same was not of such nature as to justify the remedy of specific performance, as the justice of performance on the city's part would depend upon previous performance on the part of the water company, which previous performance can not be assumed in advance as the basis of a decree for specific performance.

40. In overruling the twentieth exception of law, which was as follows (pr. rec. 141):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that complainant was entitled to a mandatory injunction against the city and the water company requiring specific performance of the contract as essential to the protection of the security for the bonds, because there is no law of specific performance which provides that the two opposite parties to a contract may be required in advance to perform such contract for the benefit of a third person having no obligation thereunder.

41. In overruling the twenty-first exception of law, which was as follows (pr. rec. 141):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that it should be required to pay complainant the rentals stipulated in the contract, because under the constitution and laws of Georgia, under which the city exists as a municipality, the contract was void and was so declared by the Supreme Court of the State, and the officials of the city would have no right to make such payments, as it would be a misappropriation of the funds of the city, and in violation by such officials of their oaths of office.

42. In overruling the twenty-second exception of law, which was as follows (pr. rec. 141):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that the complainant was entitled to a decree requiring the city and the water company to specifically perform the contract between them, because the law of specific performance is not applicable to such a contract, and the remedy is not appropriate in such a case.

43. In overruling the twenty-third exception of law, which was as follows (pr. rec. 141):

That the Master erred in his first general conclusion (pr. rec. 113) in finding that the objection to the jurisdiction was not well founded, inasmuch as the jurisdiction rested upon the Federal question presented, without regard to the citizenship of the parties, because the city says that the alleged Federal question depended upon the existence of an exclusive franchise, which did not and could not exist under the laws of Georgia, and that there was no interference threatened as to the franchise of the water company in so far as it lawfully existed.

44. In overruling the twenty-fourth exception of law, which was as follows (pr. rec. 142):

That the Master erred in his second general conclusion (pr.

rec. 113), in finding that the doctrine of *res judicata* was not applicable to the complainant, for the reason that the complainant was not privy to the State court suit, because the city says that under the law the complainant was such privy, and the water company, as shown by the proof and found by the Master, was payee of the water rentals, in exclusive control of the contract and of the right to collect the rentals up to and after the rendition of the decision of the Supreme Court of the State, the complainant having become assignee of the right to collect the rentals.

45. In overruling the twenty-fifth exception of law, which was as follows (pr. rec. 142):

That the Master erred in his third general conclusion (pr. rec. 113), in finding that this court was under no obligation to follow the decision of the highest court of the State, rendered after the contract had been entered into, and in finding that the decisions of the State court on the question involved were not so long and firmly established as to constitute a rule of property, and that this court will decide independently whether there was a contract, the obligation of which has been impaired.

46. In overruling the twenty-sixth exception of law, which was as follows (pr. rec. 142):

That the Master erred in his fourth general conclusion (pr. rec. 113) in finding that the contract did not create a debt within the meaning of the constitution and laws of Georgia, but that such contract was valid and enforceable, because the city says that such finding is an erroneous construction of said constitution and laws, and in violation thereof, as construed in decisions by the highest court in the State. The city further says that the finding of the Master is contrary to his ruling upon the main issues in the case, namely: That the plaintiff had the right to recover such debt without performance and without proof of performance, and in the teeth of its own decision that there had not been performance on the part of the water company so as to

entitle it or the complainant to recover rentals on the ground that the same had been earned by performance.

47. In overruling the twenty-seventh exception of law, which was as follows (pr. rec. 143):

That the Master erred in his fifth general conclusion (pr. rec. 113) in finding that the so-called exclusive franchise granted by the city can not be revoked by the city in its own interest, and that its value could not be impaired by competition on the part of the city itself within the term of twenty years during which the city had obligated itself to take and pay for the water for fire protection, because there was no exclusive franchise and there was no attempt or intention on the part of the city to revoke any franchise held by the water company.

48. In overruling the twenty-eighth exception of law, which was as follows (pr. rec. 143):

That the Master erred in his sixth general conclusion (pr. rec. 113) in finding that the city could not, under the facts of the case, forfeit the rights and franchises of the water company for insufficient service or for failure to supply water of a higher quality of purity, or plead such facts in bar of the equitable relief sought, because the city says that there had been no attempt on its part to forfeit any rights or franchises of the water company on any ground whatsoever, and that no such attempt of forfeiture was alleged in the bill except as to the exclusive franchise which did not exist, and because the contract required water suitable for domestic, sanitary, and other useful purposes, and the city had the right to plead the failure of the water company to supply such water.

49. In overruling the twenty-ninth exception of law, which was as follows (pr. rec. 143):

That the Master erred in his first recommendation (pr. rec. 114) that the contract in question be declared to be valid, binding, and enforcible.

50. In overruling the thirtieth exception of law, which was as follows (pr. rec. 143):

That the Master erred in his second recommendation (pr. rec. 114) that an injunction be granted prohibiting the city from negotiating or disposing of bonds authorized to be used in the construction of a water system, and from constructing or operating any system of waterworks in the city for the purpose of supplying either the city or the inhabitants with water for fire protection or domestic use, because, under the constitution and laws of Georgia, it is not only its right but its duty to do so, since it appears in effect, as found by the Master, that the city and its inhabitants are not being sufficiently supplied with water suitable for the purposes of the contract.

51. In overruling the thirty-first exception of law, which was as follows (pr. rec. 144):

That the Master erred in his third recommendation (pr. rec. 114) that the city be enjoined from revoking or attempting to revoke the rights and franchises granted to the water company under the contract during the term of twenty years it contracted to pay for water, because it was not alleged and did not appear that the city had revoked or attempted to revoke any rights or franchises of the company under the contract during said term.

52. In overruling the thirty-second exception of law, which was as follows (pr. rec. 144):

That the Master erred in his fourth recommendation (pr. rec. 114) that the city shall pay to complainant all water rentals accruing from January 1, 1896, because the contract for the payment of said rentals is null and void, and further that proof of performance of the contract by the company would, at least, be prerequisite to any rightful recovery of such rentals, and the Master found in effect that there had been no such performance.

53. In overruling the thirty-third exception of law which was as follows (pr. rec. 144):

That the Master erred in his fifth recommendation (pr. rec. 114) to the effect that the collection of taxes due the city should await an accounting to ascertain what might be due the water company for such water as may have been used by the city itself, because the taxes being due, and so held, the court had no authority to arrest the process of collection thereof, for the reason stated by the Master.

54. In overruling the thirty-fourth exception of law, which was as follows (pr. rec. 144):

That the Master erred in his sixth recommendation (pr. rec. 114) that the city and water company be required to specifically perform the contract, because that if said company was performing its contract, as alleged, there was no ground for a decree for specific performance, and if the water company was not performing its contract, the complainant had no right to recover water rentals, the contract not being one which can be specifically enforced under the law, and the practice of the United States courts, since performance on the part of the city would be necessarily dependent upon performance on the part of the company, and no court would have right to assume in advance that the water company would be able and would perform its contract with the city.

55. In overruling the thirty-fifth exception of law, which was as follows (pr. rec. 145):

After being served by the Master with the draft of his report, the city appeared and made the following suggestion:

That the Master had omitted a material fact proved by one of the witnesses of complainant, viz, F. A. Ruggles, as follows (pr. rec. 334):

That he (witness) removed the timber of the old tank when it was torn down (since the filing of the bill) in order to construct a new one; that there was at that time in the bottom of the old tank four inches (in depth) of foul and muddy sediment.

Witness had testified to this fact, and inasmuch as he

was introduced by the complainant and his testimony was undisputed, it established a fact of vital importance as showing one of the causes for contamination of the water supply, and as a fact disproving the contention of complainant that the water company had, up to that date, performed its contract in supplying the right kind of water to the citizens of Dawson. The Master admitted the truth of the allegations of the city upon this point, refusing the suggestion on the ground that his report should not be burdened with statement of evidence, but should be confined to the findings of the ultimate facts.

The city charges that the Master erred in not making such report and finding originally, and in not doing so in compliance with its suggestion, because the testimony was too brief to be burdensome, and coming from an uncontradicted witness of complainant, it established a vital and ultimate fact, viz: That the water supplied from the old tank was not suitable for domestic, sanitary, and other useful purposes, as required by the contract.

56. In overruling the thirty-sixth exception of law, which was as follows (pr. rec. 146):

The city submitted as a suggestion of change in the original draft of the Master's report, that James H. Daws, superintendent of the waterworks, a witness for complainant, testified as follows (pr. rec. 357):

> The Dawson Waterworks Company had charge of the original litigation and all these demands against the city of Dawson for water rentals up to the decision of the Supreme Court of Georgia, already referred to.

As this testimony was from one of complainant's witnesses, and as it was undisputed, it established a material fact which should have been reported to the court. The Master refused the suggestion on the ground that the testimony would be burdensome and the finding would not be of an ultimate fact.

The city says that the Master erred, because the testimony established the fact that the water company had charge of all demands for water rentals, and the original litigation for same, up to the date of the decision of the Supreme Court of Georgia, already referred to, and complainant, as privy, was therefore concluded as to all such demands based upon an assignment made subsequent to the date of said decision.

57. In overruling the thirty-seventh exception of law, which was as follows (pr. rec. 146):

The city made the following suggestion of change in the Master's report, viz: that J. A. Horsley, superintendent of the waterworks and witness for complainant, testified as follows (pr. rec. 368):

> My recollection is during the year 1900, and may be 1899 and 1900, during the very driest season, the pressure went down three or four times. It was run down so there was no pressure. Several times early in the morning it would not run out of the hydrant. was this way I suppose two or three times.

This testimony being from complainant's witness and not contradicted, established a material fact relevant to the question raised by the pleadings as to whether the water company had complied with its contract as to pressure.

The city charges that the constant existence of the required minimum pressure was vital and the very essence of the contract, and the failure of such pressure as shown by this witness, without sufficient excuse, violated the contract and destroyed the right of recovery, and that the Master erred in refusing to change his report as suggested.

58. In overruling the thirty-eighth exception of law, which was as follows (pr. rec. 147):

The city submitted a suggestion of change in the Master's report, namely, that J. A. Horsley, witness of complainant, testified as follows (pr. rec. 372):

> Occasionally they (the people) would tell me in effect that the water was muddy and unfit for use

> and smelled badly, and the pressure was insufficient, for instance on these water ends, and asked me to flush that main so that the water would clear up, and I would do it. They said the water was muddy. Once or twice they would tell me about its being muddy somewhat, smelling badly. During that time I remember complaints made several times about the pressure. My recollection about the first complaint was made during the Whitehard and Green fires in 1897. I have seen buzzards up there (on the tank) in the day.

Inasmuch as this testimony was from complainant's witness and undisputed, the facts testified to became established and were vitally material. This evidence brought home full notice of complaints to the water company, both as to pressure and unsuitability of the water, the testimony of this complainant's witness being in direct contradiction to the allegations of no notice contained in complainant's bill.

It is charged that the testimony established ultimate and controlling facts, and that the Master erred in refusing the city's suggestion.

59. In overruling the thirty-ninth exception of law, which was as follows (pr. rec. 148):

The city suggested to the Master that the two principal issues of fact were (1) whether the water company had performed its contract as to pressure, both in the proper construction of its system and in its service, and (2) whether it had performed its contract in the kind of water supplied, and that the Master should change his report as to find in the negative on both propositions.

The city says that the Master erred in refusing its suggestion, because his own report, in finding of facts numbers 8 and 9, shows that he had in effect reached such conclusion.

60. In overruling the fortieth exception of law, which was as follows (pr. rec. 148):

That the Master erred in finding and recommending any

recovery or relief in favor of the complainant, because under the law, pleadings, and facts as found by the Master himself, there was no right of recovery or relief, and the city submitted that the Master misconstrued the contract and misconceived the issues made by the law and pleadings, which were whether the water company had performed its contract by keeping up the required pressure, and by furnishing the citizens with the proper kind of water, and that before complainant had any right of recovery it was incumbent upon it to prove that the water company had performed its contract in both of these particulars during each period of time for which complainant sued to recover, and during the entire time in order to entitle it to injunction or to any decree for specific performance. The Master made no formal findings upon either of these issues, but his findings of fact numbers 8 and 9 clearly negatived the proposition that the water company had performed its contract in every particular.

61. In overruling the forty-first exception of law, which was as follows (pr. rec. 150):

That the Master erred in law in recommending and finding as a matter of law that the city should pay the complainant the sum of the water rentals accruing since January 1, 1896, because the city says that the Master made no finding of fact to this effect or upon which could be justified such a recommendation or finding of law.

62. In overruling the first exception of fact, which was as follows (pr. rec. 150):

That the master erred in his sixth finding of fact (pr. rec. 90), viz: That no other means for fire protection was afforded by the city (than that of the water company), so that it must have been recognized that in any emergency of fire resort to the use of the water of the water company was necessary and inevitable, and that the city did not forbid the use of this water for its fire department and must have known that it was being continuously so used, because the

city says that the evidence showed that the city had other means for fire protection, viz, the same it had before the waterworks were constructed; that the city did forbid the use of the water by the fire department, and it notified the company through its superintendent that the contract was at an end.

In support of this exception the city refers to the contrary findings in the same finding of the Master, that the city on December 14, 1894, notified the water company that unless a new agreement could be reached for the use of the water after January 1, 1895, the city would not be liable under the contract after that date. In further support of this exception the city also refers to the following testimony (pr. rec. 504):

> By *A. J. Baldwin*, mayor: I was mayor of Dawson in 1894–95–96; remember the action of the mayor and council relative to the abandonment of the contract with the waterworks company in August, 1894. After that I wrote the waterworks company at the request of the council, in December, giving the company notice of the action of the city. The letter is the one that is in evidence. I gave notice to Mr. Horsley, the superintendent, the latter part of 1894, or early in January, I think in 1894, that the city would not be bound for water any more. I also notified Bill Patterson, the colored fireman, and R. A. Bishop, foreman of the Mechanics' Fire Company. When I notified Horsley I told him in substance about the letter I wrote that the city was not bound for the water any longer; that we were not going to carry out the contract made by the former council. We did not consider it binding; that the council had repudiated the contract. I told him council would not be liable for any water. (For letter of Baldwin referred to, see rep. of evidence, p. 329.) The city had same volunteer fire company after January 1, 1895, it had before. City didn't exercise authority over fire company 1895–96–97–98–99, but gave tax exemptions. It was necessary to have fire company to operate the engine and chemical engine we had even if

there was no waterworks. We had a supply of water independent of the waterworks, in six cisterns in the streets. The city gave no direction to firemen or fire organizations during the years named to use water of the company; never gave them any authority to use it; they knew the contract had been abandoned by my having notified the parties. They had no authority so far as the city was concerned, during these years, to use the water of the water company. If the city gave any direction for them to use it I never knew it. The mayor gave no such direction or permission. After '94 I never did, and never empowered anyone else to do so. I was mayor in 1895. Was at bakery fire. The people used the company's water there. My recollection is that I took hold of the hose then as I have at all fires. I do not think that I handled the nozzle. I didn't assist as mayor any more than I did when I was not an official. I helped use some of the water. Even now if I go to fires and see it is necessary I take hold. I did at any time during 1895–96–97. I was mayor during these three years. I always took an active part; helped to use the hose. I did take hold of the nozzle if I could use it. If Mr. Horsley ever notified me that they expected the city of Dawson to pay for the water, I don't recollect it.

By *Dr. J. G. Dean* (pr. rec. 537): Member of council since 1894 to present time. During this time have seen water used by any and everybody; saw people to whom city had given exemptions use water just as individuals; was present and saw it; think other members of the council were present and saw it. Never forbid them from using it, strictly, so far as I know; used the apparatus kept in the building belonging to the city, which were returned after the fire; returned by those who had exemptions and others. Bought new hose '95 and '96. Had the same arrangements after January, '95, we had before. Fire engine not used except in a few of the fires; not over two or three.

By *R. L. Melton* (pr. rec. 570): In 1894–5 was alderman and chairman of fire committee which had especial jurisdiction over fire department. Remember

action of council in 1894 in renunciation of water company's contract. Soon after that had two cisterns pumped full of water and Roberts overhaul engine. This was about the first of 1895. The fire company had a row about that time and went to pieces. Bishop managed one of the fire companies at the variety works. I notified him we had nothing more to do with the city waterworks and must have nothing more to do with the hose. The city waterworks attached their hose to the variety works. I told Mr. Roberts we had no contract with the waterworks company and he could not use their water any more.

By *John Seay* (pr. rec. 576): From '94 to '98 I was chief of police, this city. The organization of the fire department was very poor, I thought. I was member of the fire company. The paid fire department was organized about 1899. Up to this time, during those years, most everybody in general that got there first did the work of putting out the fires. It was the work not of any particular organization, but generally of the crowd that assembled. I always tried to get there. I remember one time taking the reel over to Dr. Dean's; don't think there was a man that belonged to the fire company there except Robert Baldwin. He helped pull it over there. There were sixteen in squad. We were the only two firemen in it; and two negroes helped us, not members.

Chas. Deubler (pr. rec. 619): Resident since '73. Have been in council off and on ever since have been here. Have been chairman of the fire committee, engineer, etc. Engineer ever since they got an engine, except one or two years I quit. I have had experience in dealing with water for fire plugs and engines, hose and nozzle, for the purpose of extinguishing fires ever since I have been here. I think since they bought the engine in '85; somewhere along that time. Since then have been familiar with the different kinds of apparatus the city owned for fire purposes, which consisted first of a chemical engine, 120 gallons, hose reels, steam fire engine, two reels. During those years they kept from 600 to 1500 feet of hose. One reel carried the other 400. The nozzles run from half an inch to an inch.

63. In overruling the second exception of fact, which was as follows (pr. rec. 153):

That the Master erred in his sixth finding of fact (pr. rec. 90), viz, in finding that notwithstanding the city had repudiated the contract it continued to enjoy the fire protection afforded by the water company and to use the water for that purpose, in the same manner and to the same extent that it did prior to its repudiation of the contract, because the proof showed not only a renunciation of the contract by the city but the abandonment of the water system and the means it afforded for the extinguishment of fires, and that the use thereafter of the water of the company was by the people, indiscriminate, including the officials of the city, who were not acting in official capacity or from any authority of the city. In support of this exception the city refers to the brief of evidence contained in the preceding exception of fact.

64. In overruling the third exception of fact, which was as follows (pr. rec. 153):

That the Master erred in his eighth finding (pr. rec. 90) of fact, (1) in making a partial report only of the facts; (2) in finding that the condition of the waterworks was substantially the same as it was at the time of selection, because the evidence showed that the scaffold and slaughter pen was begun and maintained after the selection of the source of water supply; (3) in not finding the causes of contamination as shown by the undisputed evidence; (4) in not finding that the causes of contamination, viz, the slaughter of cattle, leavings of offal, drainage from surface closets, were without the limits and jurisdiction of the municipality; (5) in not finding that the water company had failed after full notice of the causes of contamination to protect the water sapply, and (6) in not finding from the undisputed evidence that because of such contamination, the water furnished to the citizens of Dawson was so muddy, filthy, and offensive

to the smell as to be unfit to drink or to use in cooking, washing, or bathing.

In support of this exception the city submits in substance of the following testimony:

By *John Seay* (pr. rec. 585): Was marshal of city 1897, '98, '99; during that time complaint was made to me about something stinking at the branch at the source of the waterworks. Mr. J. A. Horseley, superintendent of the waterworks, and I went up there and in about fifty yards of the mouth of the inlet pipe where they got their water from, in the stream that runs into the inlet pipe, there was a dead horse. His rump was in the water. He was in a very bad fix; he was rotten. When we pulled him out, the hide and stuff. I don't remember whether he saw the horse pulled out or not. I think he made the negro do it. I think the complaint was made by somebody and Mr. Horsley went up there hunting for it; did not know at the time it was up there. I don't think Mr. Horsley knew it was there until that day he went up and hunted for it. The complaint was probably made to Horsley, and me and Mr. Horsley went up there together. I don't know that I knew it my duty to protect the water supply. I knew it my duty to move it as soon as I found it there. It was out of the city limits, probably forty or fifty feet.

By *J. W. F. Lowry* (pr. rec. 592): Am mayor of Dawson. I know location of waterworks company's plant and surroundings; have seen source of water supply and arrangement by which conducted; where it is appropriated by the company; have examined all the premises up to as far as a spring is designated from which water was to be used to supply the town; Dunn's Spring. The branch extends a great way beyond that. The land through which this branch flows and in which the springs are located, above the waterworks company, is a dark, murky, muddy swamp; and the contamination of the land, especially on the west side, is situated so that all the washings from six to eight residences and the other houses are necessarily

thrown into this branch. That drainage is now contaminated by the surface washings from privies, horse lots, and the butcher pens. The driftings from these places all run into this branch. The whole swamp is very largely covered with vegetable matter, especially above Dunn's Spring. Nothing whatever has been done by the waterworks company to protect this spring or their outlets or this branch above the mouth of the inlet pipe which leads into their waterworks; and as nothing in the way of protection to prevent the flowing of the surface waters from these settlements I have spoken of along the whole side on the west, into these springs and other branches and the main branch above the inlet pipe, it is an absolute fact that all this water does flow into that place. I have had in my family as much experience with this water of the company as it is possible for my family to have, I suppose; have had the water in my house and yard since the beginning. The water has varied. In dry weather the water is clear and apparently fit for use, and but for the fact that we know the contaminated sources from which it came, we might use it for drinking purposes. I have never used it for that purpose because of the source from which it is brought. Sometimes it is very nice for bathing and sometimes it is wholly unfit for bathing. It is permeated with mud as red as mud can make water by flowing into it; I could not tell what proportion of time. I know this—we have not had any rain here of any consequence in eight or ten days, and the water has not cleared up from it yet. I have tried to use the water for bathing purposes; generally use it in bath tubs. I have on several occasions filled the bath tub with water and it was so bad I could not use it; let it out again. Used it almost every week for bathing purposes. It is very objectionable, still we have no other source from which we get bathing water. It is not at all fit, I think, for laundry purposes; never heard of anybody using it for that. Hardly fit for cooking purposes; still we used it for that; boiled it; by that means we hope to destroy the germs, disease-producing germs, that might be

in it. We used it for that because it is so inconvenient to get other water. Some have built an artesian well in our neighborhood because of the fact that it is unfit for use for drinking. The neighbors joined in and dug an artesian well. This has been done by two or three others in town that I know of; maybe three.

By *A. M. Raines* (pr. rec. 605): I know Adams' butcher pen testified about. It is located 200 yards, to the best of my judgment, above the inlet pipe they got their water from. The drainage from this butcher pen flows into the branch the water company gets its water supply from. This butcher pen has been used almost continuously for the last three or four years. The cattle that are butchered are kept right there. The offal is thrown down there on the ground, from where the drainage goes into the branch that the water company get their supply from. The butcher pen is for the public market. I have a farm beyond this butcher pen and I go backward and forward to that farm and have seen beeves butchered there on various occasions. I have used the water of the company since 1898. It has been very muddy and filthy at various times. Sometimes it would stink. We have never drank the water at all; have been afraid to drink it. We tote water from the artesian well to drink; cook with this water sometimes. The time it got to stinking so bad we quit using it for drinking purposes. Where this butcher pen is located is on the private property of Mr. Adams and outside of the city limits.

By *R. J. Sewn*, (pr. rec. 608): Am a butcher. Butchered out here at Mr. Adams four months year before last; know where waterworks station is; the butcher pen is on the hill about 300 yards above the station. Year before last during four months I butchered out there, sometimes three cows a day, sometimes one every day; left the offal there; hogs got some of it; don't know what went with balance; suppose the buzzards got it; saw buzzards there. By offal I mean the entrails of animals and contents. Don't know of any occasion when the offal was taken away. The surface water from there went into the

branch that supplied the waterworks. I have seen cows butchered there this year since Christmas. Some days I wouldn't kill any cattle out there at all; some days would kill one; some days four or five; three or four. Didn't keep the place clean; offal left there on the ground; Adams had hogs there; they had access; Adams' house about 300 yards.

By *R. F. Simmons*, (pr. rec. 601): Know pumping station waterworks company and where they get the water from; know the creek well; know there is a butcher pen two or three hundred yards above, northwest; above waterworks station two or three hundred yards. I don't know any way the water could go from there except towards the creek; I know the butcher pen has been used; have seen them butchering several times; they throw the offal to the hogs; have seen them eating it; that butcher pen has been there two or three years, maybe more; Adams kept the market here in town and supplied the town to some extent. I think the butchering has been going on there two or three years.

By *W. F. Locke* (pr. rec. 614): Have been using water of the waterworks company seven or eight years. Used it possibly two weeks for drinking purposes two or three years ago. Later I got the boy to bring us water from the pump in the business part of the town. Bought a filter and used the water of the waterworks company for ten days or two weeks, and quit using it on account of the filth that had accumulated in the filter. At times the water is muddy and unfit for use. On one or two occasions odor was so bad would not use it for drinking purposes but had water brought from well; that was about four years ago; think I have used the water since 1894. Have not noticed any offensive odor for the past year or two. I noticed once or twice the first year I moved around where I am now living. I detected offensive odor more than once or twice. Two occasions I refused to bathe in the water because of the offensive odor; possibly noticed it four or five times; don't think that was when the water was very muddy; don't remember whether the water was very low; don't know what caused the offensive

odor, but don't think it was mud; never used it for drinking purposes except the two weeks that I spoke of.

By *Walter Christy* (pr. rec. 616): Living here about twelve years; know property of waterworks company; well acquainted with the surroundings, and the creek and spring up there; I lived out there at my grandmother's a year, '90 or '91; since then have visited up there frequently, constantly. There are some houses on the hillside on the west, and a butcher's pen about 150 yards from the stream up there that supplied the waterworks. Mr. Adams did the butchering there for two or three years back. I understand he used it in December of last year. He used it for butchering cattle; I have been there and seen him butchering a good many times; I suppose thirty or forty times during the last two years. Offal and excrement from the cattle is left on the ground for the hogs; don't know that they always consumed it. In case of rain the surface water from where the offal was thrown, where this butcher pen is located, goes into this branch from which the pumping station gets their water. No other source for it to go to. Don't know whether they are using the butcher pen now or not; have not been there since February or March. Sometimes there would be more offal than at others; sometimes two cattle; that is as much as I have seen at one time. Have seen offal there when fresh and when it had been there for some time; about one hundred yards from the creek; never measured it. I know it is on the hillside, and there is no other way for the water to go except into that stream. Where the cattle is butchered there is a slope toward the branch. The ditch goes from the pond into the creek. From the butcher pen it does not drain into the pond. The pond is back in another direction. The pond is dry most of the time. The ditch from the pond runs into the branch.

By *Dr. L. C. Goneke* (pr. rec. 639): Practicing physician eighteen years; lived in Dawson twelve years. Have been using the water of the waterworks company ever since but until last two months. Drank it

for a short while; used it after that for irrigating garden, yard, and for bath tub, kitchen, watering stock, etc.; could not use it as drinking water; caused indigestion. Wife and I quit using it on that account. Used it for bathing purposes. At times it would not be used at all. Entirely too muddy and had an offensive odor. Quite a number of times this was the case during my experience with it after rains. I attributed it to the effect of rain on the water. Peculiar offensive odor when I turned it on in bath tub; didn't use it at all; impossible to say how many times; quite a number in my experience. About as definite as I can be, I suppose about six or eight times in one month and once in two or three months. I attributed it to the rains. In dry weather water was very clear and very good for stock uses and bathing purposes. Could not use it as much as I needed for irrigating purposes. At that time I was notified to hold up on it, by Mr. Horsley, the superintendent. That was the time when I appeared to need it particularly for irrigating; paid for it during the winter when I had no use for it. I state as a physician, having used this water and having had experience with it, I consider it very unwholesome. Not speaking as a physician, I consider it good for bathing purposes, except at times when it became muddy. I consider it good for cooking purposes as soon as it was boiled. Quite a number of times I could not use it for irrigating purposes, in the summer when it was very dry; could not tell what year; near midsummer. I could not tell to save my life what year, only from being put on notice several times during my experience with the water. Not the same summer; three or four summers They have been every summer I use it; I can not be positive about the number of summers. Quite a number of times; six or eight times; something like that; don't think all one year or season. When I was notified to that effect it was during exceptionally dry times in summer.

By *J. S. Lowry* (pr. rec. 650): Have lived in Dawson twenty-five years; in '92 lived on Main street; had water pipe run in rear door to be used for cooking purposes; tried to use it for cooking

purposes and could not; muddy and had a bad odor in '92, in the spring and summer. We cut it off then and since I have been living on Lee street and tried it again this summer; tried it last year. Got it in my yard and every once and a while I tried it; same trouble was the result last year and the same trouble this year; has red color to it and is offensive. Was member of council in '94. Made no complaint officially, made no complaint personally or request for improvement. I quit it.

Dr. A. R. Lamar (pr. rec. 651): Physician eight years; been living in Terrell all that time; Dawson two years and a half or more. Have had experience with the water of the Dawson Waterworks Company; have been using it for irrigating garden and in barn; have used it part of the time for cooking purposes and in the bath room. Did not use it for drinking purposes; found it was bad; had an odor that was offensive. I also saw if you draw it from the hydrant and let it stay over night in the pitcher it would have an odor about it; would have an odor most of the time after setting a while. I consider it unwholesome, so much I did not drink it. It was all right for cooking purposes if boiled. Have never used it for drinking purposes when I could get any other; been using artesian water from town pump. What I say about this water is based on actual test, so far as drinking. I have noticed it is offensive; very often. If you draw it out of the hydrant and let it stand over night in bucket or pitcher, it will always have a bad odor. I have let it stay over night in a bucket or pitcher to see, about 365 days in a year. It is not always offensive in the morning, but nearly always so. Running water, as I understand it, purifies itself by coming in contact with the air, and standing water, especially if there is any nitrogenous matter in it, putrifies. My idea is that standing all night in a pitcher it putrifies. If the water was pure I would not expect it to putrify. I mean by nitrogenous matter in it, vegetable and animal matter; inorganic; that causes the putrifaction.

By *Chas. Deubler* (pr. rec. 654): Live right across the street from new tank, top of it is open; of the old

one was covered. I have seen buzzards roosting on the new standpipe at different times in the daytime, as many as six there at one time. It has been so within the last two weeks. You can see them there most any time in the day, as many as one, roosting there, as far back as directly after it was built. It is a roosting place for buzzards; they roost awhile, then sail off and another will come.

By *A. J. Baldwin* (pr. rec. 612): The school here in our present condition is supplied with artesian well water; has been for five years, because the board and teachers at that time considered the waterworks' water as unfit for use in the school. I am a member of the board. I was at the time of the meeting and acquiesced in it; the board acquiesced in it. I think it was on the recommendation of the superintendent and the complaints of the people and teachers at that time. It was verbally condemned by the concurrent action of the committee. Had to pay $5 a month to have water hauled to the school. Had water connected at the school with the city water, I think soon after the waterworks were put in. They have kept it there all the time until three or four years ago.

By *J. A. Horsley* (pr. rec. 667): Superintendent of water system and witness for complainant. I reported the dead horse to the chief of police, because I knew it was wrong to let it stay there, people getting water from that stream. As soon as I discovered it was up there I went to the chief of police at once. For eight or nine months I spent much of my time in the engine house where the water is pumped. I have spent my other time around on the streets about in different places; I go down and inspect things occasionally as superintendent. I don't stay there regularly. I don't stay at the standpipe regularly. I stay about on the streets engaged in other business, real estate and life insurance. Don't know whose horse it was that died in the branch; understood it was a negro's. Did not know he was there before he died (page 135). Occasionally the people told me the water was muddy, unfit for use, smelled badly, and pressure was insufficient, for instance on these water ends, and asked

me to flush mains so the water would clear, and I did it. During that time I remember complaints made several times about pressure. My recollection of first complaint, Witchard and Green fire, '97. Have seen buzzards on tank in day.

By *F. A. Ruggles*, witness for complainant (pr. rec. 344): I removed the timbers of the old tank when it was torn down and ordered to construct a new one. There was at that time at the bottom of said old tank four inches in depth of foul and muddy sediment.

The city, in support of this same exception, refers to the affidavit of George Calloway, employee of the waterworks company, filed by consent of Master and counsel on both sides of the case as evidence in the case, May 29, 1902 (pr. rec. 753), and another of the same witness, June 3, 1902 (pr. rec. 755), and after the re-examination of the other witnesses orally, proving the discovery, in the water tower of the company, of three dead and decayed buzzards in May, 1902. The city refrains from encumbering the record in briefing all of the testimony to the same effect as the above, inasmuch as the same was not contradicted to any extent in any material particular, and inasmuch as the Master himself has found, informally but in effect, that the water was not kept in a condition suitable for the purposes intended.

65. In overruling the fourth exception of fact, which was as follows (pr. rec. 160):

That the Master erred in not finding that the water supplied to the citizens of Dawson from January 1, 1896, up to the filing of his report was not suitable for domestic, sanitary, and other useful purposes. In support of this exception the city refers to the testimony briefed in support of exception of fact No. 3. Said testimony was not contradicted to any extent in any material particular.

66. In overruling the fifth exception of fact, which was as follows (pr. rec. 160):

That the Master erred in finding (findings of fact, No. 9, pr. rec. 92), that except on rare occasions the reservoir was

kept supplied with water sufficient to produce the required pressure, because he should have found from the evidence that the water company had not performed its contract as to pressure, and that its service had not been adequate or reliable to the extent required by the contract.

In support of this exception the following brief of the evidence is submitted:

> By *W. R. Baldwin* (pr. rec. 501): When the cap was taken off the plug at the kiln fire water would not come out at first, but solid, soft mud. I suppose a half minute; might not have been so long before the water came; commenced coming mud. I saw the mud come out and I stopped and looked at it. The hose was two or three feet from it when the mud came. By the time the hose got there I suppose one-third water came and the rest mud. When it first came out it was solid, soft mud. It was coming out of the end of the hydrant. It was on Main street about 100 yards from the public square. It was on the principal street in the city, about a block from the business center.
>
> By *A. J. Baldwin* (pr. rec. 512): After the three houses burned at Green and Whitchard fire, 1897, a day or two Mr. Horsley told me they were going to make a test and I went with him. He took 100 feet of new hose furnished by him and went over there and attached it to the plug in front of Mr. Melton's, the same plug that played on these buildings of Green and Whitchard. Had two sections of hose, fifty feet each, new, attached to the plug, a one-inch nozzle, and the water barely went above the electric light pole. It was turned on full. It went not exceeding five feet above the pole. The pole was 25 feet high. The height of the water did not exceed thirty feet. The air was still enough to make a straight stream; ordinary condition of air; no interference with stream by wind. This was in 1897. No change had been made in the waterworks from '94 up to this time, that I know of, and none from the date of that test up to the time the new tank was built. The Green

and Whitchard houses were burned up. I remember the Grier and McClellan fires in '98 on Lee street. The distance from the plug to the building there was 80 feet, and the house sets inside some 25 feet; 100 feet, I would say, from the plug, excepting the width of the sidewalk. There was no unnecessary amount of hose. There was only one line of hose from the plug.

By *J. G. Dean* (pr. rec. 539): The old tank from the ground to the bottom of the tank was 59 feet and 7 inches. Mr. Baldwin and I measured it. For several years before it was torn down it leaked badly, never possible to fill it entirely, at least for several years before it was torn down. Might possibly by pumping all the time get it full. During these years it was not generally kept full; it leaked so badly; it was possibly kept two-thirds or about three-fourths full. The present tank is forty feet higher than the other.

By *Dr. W. B. Cheatham* (pr. rec. 555): During '96–97–99, I think twice, I can remember no more positively than that, I found the standpipe empty; one time in the day and the other at night. I tried to draw some water in my bath tub, is the way I know it was empty. At another time I thought it was frozen. The weather was all right the first time, I think it was in the spring; not cold water. There was no water in the tank at all; could get no flow. I told Mr. Horsley and he stated to me, I think upon investigation, that this standpipe was empty. It was empty twice; not on account of any freeze; been stopped up several times by freezes. It was twice, I think that Mr. Horsley admitted, that the pipe was empty. The fault of the engineer or somebody; I don't know who. The last time I found it empty it was between '97 and '99. I can not say what year prior to that time it was. Where I live the surface is lower than the surface at the standpipe. I investigated all around and the water would not run from my faucet in my house; during '95–6–7–8, the standpipe was rotten and leaked. It was leaking all along. I saw it; a considerable stream would pour out between the whole body of it; between the staves where they came together; twenty feet from sidewalk; in-

terfered with passage. Sometimes you would have to go around on the other side of the street to get out of the spray of the water from it. It would wet the sidewalk so it was almost impassible, especially when ladies would walk around it. Horsley admitted to me that the standpipe was in a bad condition, in conversation about six months before this bill was filed. I remember the test on one occasion on College street, of the pressure, very well. Mr. Horsley, the superintendent, was present. I was there by accident, passing by to see a patient. They attached the hose, turned on the stream, and threw the water twenty or twenty-five feet, or probably thirty feet high. It was some new hose they had; 100 feet. The force of the water was turned on. Mr. Horsley manipulated it. From what I could see the test was made fairly and fully. The air seemed to be pretty still. I noticed that no currents were affecting the stream to blow it one way or the other; seemed to be what you would call still air. The water went from twenty to thirty feet. I noticed the height of it. That was on one of the principal streets of the city.

By *John Seay* (pr. rec. 577): I remember the McClellan fire in June, '98, very well, but not the date. Only one that I remember. I noticed the use of the hose on that occasion; can not exactly give you the length of the hose; can give you the distance of the plug to the fire; don't think there were but three sections of the hose used; don't know what the length of the hose was; some thirty, some fifty feet to a section. It is even 100 feet from the plug to the eaves of the house. I measured that; I do not remember that there was any surplus hose used on that occasion; did not have hold of it myself; I don't think the hose was 100 feet; the water was fully turned on; there was only one line of hose from that plug; it was the size of nozzle used all the time; it was the usual nozzle; I think it was a pretty day; don't think there was any storm concealed; no storm; in my recollection it was still; the hose was about 20 feet; they got there with the hose, but could not get the water on it; we threw the hose up and down, trying to make the water go further; hit

on top of the house about twenty or twenty-five feet; didn't go on the roof of the house; it did go on the eaves; the water went about twenty or twenty-five feet high; not over twenty-five.

By *F. M. McNulty* (pr. rec. 588): Lived in Dawson since '81; alderman at one time; remember the McClellan fire very well, but not the year; I suppose it was 100 feet from the plug to the McClellan house, that was on fire; I think I turned the water on; I turned it on properly; I don't think the hose was over 100 or 150 feet; they didn't have any hose to spare; I don't think there was over 100 feet, though I won't be positive; they had an inch nozzle; the city had an inch nozzle and some three-fourths of an inch; this was the city nozzle; there was not any pressure on this occasion; threw the water about to the eaves of the house, twelve or fifteen feet from the ground; tried to throw the water and could not; did not have pressure enough; was not force enough behind it; don't remember any disturbances in the air; this was on one of the principal streets of the city; got an old door and held it up front of the men holding the nozzle; got up to the house as close as they could that way; couldn't throw the water on top of the house; I remember the test made by Horsley and others in 1897 at Doc Melton's; I was there; Andrew Baldwin was there and Mr. Horsley; I remember those two; had 100 feet of hose; made a full and fair test; Mr. Horsley conducted this, when it was made with the new 100 feet of hose; the air was very calm; it was a one-inch nozzle; Horsley turned the water on; threw the water in every way on that occasion; would throw vertically, and the highest it went was 25 or 30 feet.

By *C. Deubler* (pr. rec. 620): I remember the McClellan fire. Very poor amount of pressure on that occasion; threw the water about 20 or 25 feet. The air was still at the McClellan fire, Parks fire, Green and Witchard fire, and the dry kiln fire when I was present. I will state from my observation of the way the water was thrown and handled and manipulated on this occasion; that there was not sufficient pressure from the waterworks company to have thrown

water through 100 feet of hose, one inch nozzle, in still air, vertically, fifty feet; there was not pressure enough. (The Master allowed this testimony over objection after the witness stated his experience with water and fires.) I remember the old tower; lived 75 or 100 yards, right across the street, in 1895–6–7–8, until it was replaced; it was in a leaky condition. After filling it about half full, further up it leaked; like filling a basket. It leaked all around; shot out in big streams, in some places as big as my hand. Had large streams and small ones all around the staves, running up and down. When the wind was blowing the water would reach my porch. Don't think the tank had been filled in several years (p. 511). It could not be.

By *J. P. Allen* (pr. rec. 642): Acting in capacity of engineer for the waterworks company at the station. Water muddy, right smart. It was deficient in quantity; was not enough of it for filling the tank; that was true right smart; had to run the pump slow; been times in which you could not get enough to fill it at all during dry weather. The standpipe in town was very leaky. I would get it full before I would quit; has taken as long as six hours. My instructions were to keep it full in case of fire. I was required to keep it full. It would be hard to do sometimes. I have to keep the pumps going day and night, and then it would not get full, the tank leaked so bad. Sometimes the water was very muddy and sandy when it was dry, on account of the suction. The water was low down and it would suck sand. The sand would finally clog in the well, and would have to pump sand; would cut out the plungers and valves. Water was very druggy when it was low. I did not drink the water. It was not fit to drink. I thought it was unclean. In opening the pumps I noticed an inch of corrosion and mud clean to the well part of the pump. There was a kind of offensive odor like you will find in muddy streams. I thought the inlet pipe should have been cleaned out. I don't know if I did not mention it to Mr. Horsley that there should be made a hole to keep the same out. Would be sucked up through the

pump. The pump is what kept that from filling up, I suppose; never was cleaned, to my knowledge. I was employed as engineer for thirty days by Mr. Horsley.

On cross-examination: Q. It was filled all the time you ran the pumps during that exceptionally dry spell? Just took longer to fill it? A. Don't think they had sufficient water to fill it; kept running the pumps.

By *E. J. Cameron* (pr. rec. 654): Age 29. Am chief fire department Dawson; have had experience 12 years; from bottom to head of this department; since November, '99. Since present tower have noticed the absence of pressure once that I know of. For twenty minutes, I suppose. I know there was no water in the tower; no water came up here in the engine from spigot. It was six or seven months ago. I immediately notified Mr. Baldwin and Mr. Deubler; thought there might be a burst in the main, or something to cause the leak, or the tank run dry, without their knowing about it. One Saturday morning I started to wash the wagon and the boy complained there was no water coming out of the faucet. I went and tried the faucet and there was none. Went and tried it again in about twenty minutes and the water was coming in full pressure. I don't know sir how long it had been empty.

By *Horsley, superintendent waterworks company* (pr. rec. 368): During the summer of 1900, maybe 1899 and 1900, during the very dry season, the pressure went down three or four times, so low there was no pressure. Several times early in the morning it would not run out of the hydrant. It was this way, I suppose, two or three times.

67. In overruling the sixth exception of fact, which was was as follows (pr. rec. 165):

That the Master erred in his ninth finding (pr. rec. 92) that "No complaint concerning the character of the service or the amount of the pressure was made to the water company after the institution of the present suit," because such

finding is contrary to the evidence and to the undisputed testimony of complainant's own witness, Superintendent Horsley. See brief of his testimony, exception of fact No. 3.

68. In overruling the seventh exception of fact, which was as follows (pr. rec. 165):

That the Master erred in his third finding of fact (pr. rec. 87) "that the city had express notice that bonds were to be issued and sold for the purpose of procuring the money with which to construct the waterworks plant, and that the city acquiesced in this arrangement," because the evidence showed that such notice was not received until after the contract was made and much of the work done by the water company toward construction.

69. In overruling the eighth exception of fact, which was as follows (pr. rec. 165):

That the Master erred in not finding that prior to the date of the assignment of the cause of action of complainant, the water company not only had demanded payment of the water rentals, but also had entire control of the contract, said fact having been proven by the uncontradicted testimony of James H. Daws, superintendent of the water system and witness for complainant (pr. rec. 357).

70. In overruling the ninth exception of fact, which was as follows (pr. rec. 165):

That the Master erred in his fifteenth finding of fact (pr. rec. 93), because the same was wholly irrelevant.

71. In overruling the tenth exception of fact, which was as follows (pr. rec. 165):

That the Master erred in finding for the company the right to recover water rentals and all other relief, because the evidence not only failed to show that the water company performed its contract as to pressure or kind of water or otherwise, but the uncontradicted testimony showed quite the contrary.

ARGUMENT.

Demurrer to Jurisdiction.

Prior to the filing of the bill the city of Dawson was a stranger to the complaining trustee. The contract between the city and the water company was made before the company gave the mortgage to complainant, and the city had no part in the transaction between the company and complainant. Therefore no liability against the city and in favor of the complainant could accrue except such as arose or arises under and out of the contract the city made with the company. Hence, under the averments of the bill, the complainant could have no claim against the city unless the same claim had accrued against the water company. Comer *vs.* Sheehan, 74 Ala. 457; Jones, Mort., 773–4.

When the bill was filed, the complainant as trustee for the bondholders had no accrued demand against either the city or the water company, there having been no default. The water rentals were only mortgaged to secure payment of the interest on the bonds. The court below found (Master's Concl. of Law, No. 2, subd. 7, pr. rec. 110) that all interest maturing prior to the assignment of the rentals by the water company to complainant had been paid and that the indebtedness represented by the coupons on the bonds having been extinguished, the complainant could not enforce payment a second time in the interest of the American Pipe Company, not a party to the suit, which had loaned the money to the water company.

Since, at the date of the filing of the bill, the bondholders had no demand to satisfy against either the water company or the city, complainant's bill was fictitious and simulated, at least to the extent of its claim to recover the accrued rentals.

Complainant had notice of the litigation between the water company and the city, and of the judgment of the

Supreme Court of the State adverse to the water company when it took the assignment of the rentals, and it is patent on the face of the bill that the assignment was merely colorable, not in satisfaction of any accrued demand, and for no other purpose than to confer Federal jurisdiction, so that the right to collect rentals could be litigated in a different jurisdiction, and, notwithstanding the identity of interest, the water company was made defendant, otherwise the apparent diversity of citizenship could not have been obtained.

The matured coupons having been paid, the bondholders had no interest in or lien on the accrued rentals proposed to be enforced by the suit, and under the circumstances of the transfer as set forth in the bill and so found in effect by the court below, the demand for rentals accruing prior to the date of the suit was made by complainant, not as trustee for the bondholders, but as such for the benefit of the water company; the assignment was fictitious and the suit collusive and should have been dismissed. Williams *vs.* Nottawa, 104 U. S. 209; Hayden *vs.* Manning, 106 id. 586; Hawes *vs.* Oakland, 104 id. 459. It should have been dismissed because the transfer was not absolute, but merely colorable (Maxfield *vs.* Levy, 2 Dall. 381, and 4 id. 330; Barney *vs.* Baltimore, 6 Wall. 280, 288), and collusive. Marvin *vs.* Ellis, 9 Fed. 367; Coffin *vs.* Haggin, 11 id. 219. If the water company is the real party and complainant's interest nominal, the bill should have been dismissed. Smith *vs.* Kernochen, 7 How. 216.

Besides, it seems well settled that a mortgage given by a water company, covering rentals accruing under a contract with a city, can not clothe the mortgagee with the right to maintain an action against the city in a Federal court where the mortgagor and the city are both corporations of the same State. American Waterworks *vs.* Home Water, 115 Fed. 171, citing N. Y. Guaranty *vs.* Memphis Water, 107 U. S. 205; Eau Claire *vs.* Payson, 46 C. C. A. 466, on rehearing 48 C. C. A. 608.

In extending the jurisdiction of the Federal courts, Congress was "specially careful to guard against the consequences of collusive transfers," and by section 5 of the act of 1875, c. 237, it imposed the duty on the Federal courts of their own motion to dismiss suits the moment anything of the kind appeared. Congress had in view the protection of the courts as well as of parties against frauds upon Federal jurisdiction (Williams *vs.* Nottawa, 104 U. S. 211), and the suit of a collusive transferee is entitled to no consideration even though he be the *real party in interest as to a part of the cause of action*, he being only colorable assignee as to the remainder (id. 212), and if jurisdiction was first obtained by a collusive transfer, the suit should be dismissed and the parties remitted to their original rights, notwithstanding that since the filing thereof, and before action of the court, the transferee's part had become, from accumulated interest, sufficient to invoke Federal jurisdiction (id. 212).

It was the duty of the court below to have ascertained the matter in controversy and to have arranged the parties according to interest, and when so arranged, if it appeared that citizens of the same State were parties on both sides of the controversy, the court had no jurisdistion, Pac. R. R. Co. *vs.* Ketchum, 101 U. S. 298; Barney *vs.* Latham, 103 id. 211; Removal Cases, 100 id. 457; Walsh *vs.* Memphis, 6 Fed. 797; Saginaw *vs.* Saginaw, 28 id. 529; Covert *vs.* Waldron, 33 id. 312 (authorities cited); Pittsburg *vs.* Baltimore, 61 id. 709; Tug River *vs.* Brigel, 67 id. 629; Oberlin *vs.* Blair, 70 id. 414; National Bank *vs.* Radford, 80 id. 572.

According to interest, a Georgia corporation was complainant and a Georgia corporation was respondent. The bill should have been dismissed for want of jurisdiction.

Federal Question—Equitable Jurisdiction.

No Federal question was alleged in the original bill. Defendants demurred to the jurisdiction for want of citizen-

ship and complainant alleged a Federal question by amendment to prevent the dismissal of the bill. The court below decided that a Federal question was presented, and that it was not concerned as to what motive prompted the simulated assignment, and it refused to arrange the parties according to interest.

Now what Federal question was presented by the amended bill? The object of the suit was (1) to enforce collection of water rentals; (2) to prevent the city from violating its agreement to commute taxes; and (3) to protect from impairment the exclusive franchise alleged to have been granted the water company.

It is settled that a breach is not the impairment of the binding force of a valid contract within the inhibition of the Federal Constitution, and that the remedy therefor and for refusal to pay accrued rentals would be a suit at law. Tex. & R. R. Co. *vs.* Marshall, 136 U. S. 393; Marble *vs.* Ripley, 10 Wall. 358; St. Paul Gas *vs.* St Paul, 181 U. S. 142; Raton Water *vs.* Raton, 174 id. 360; Lehigh Water *vs.* Easton, 121 id. 392; Fergus Falls *vs.* Fergus Falls Water, 72 Fed. 873.

It has been held (American Waterworks *vs.* Home Water, 115 Fed. 172) that—

> "A right of action against a city to recover water rentals claimed to be due under a contract is at law, and a Federal court of equity is without jurisdiction to enforce the payment of such rentals, even where it has acquired jurisdiction to determine other matters in controversy between the parties."

And that (p. 181) the general rule that a court of equity having once obtained jurisdiction of a cause should retain it, does not apply in causes of this kind in the Federal courts, because—

> "The Seventh Amendment to the Constitution guarantees, in all legal controversies where the value in controversy shall exceed $20, the right of trial by

> jury. That provision would be defeated if a strictly legal question could be tried by a court of equity (Hipp *vs.* Babin, 19 How. 271; Whitehead *vs.* Shattuck, 138 U. S. 146; Scott *vs.* Neely, 140 U. S. 106)."

No Federal question or ground for equitable jurisdiction could be involved in the mere renunciation of the contract or refusal to pay rentals.

The court below itself eliminated any such question or ground with regard to the agreement to commute taxes by declaring that agreement void (Master's conc. of law, No. 2, subd. 6, pr. rec. 110).

The Federal question and its correlative in this case, the equitable jurisdiction, must then of necessity be predicated solely on the impairment of the exclusive franchise alleged to exist in favor of the water company and so held to exist by the court below.

The fundamental question of jurisdiction, first of this court and then of the court from which the record comes, presents itself in every writ or appeal, and must be answered by the court, whether propounded by counsel or not. Defiance Water *vs.* Defiance, 191 U. S. 194; Mansfield *vs.* Swan, 111 id. 382.

Even presupposing a valid contract as the basis of this suit, this court has no jurisdiction because, on the face of the pleadings, there has been no impairment of the obligation of the contract in a constitutional sense.

In the early period of our judicial history there was some confusion of the term "obligation" with the word "contract," respecting the constitutional inhibition against the passage of laws by States impairing the obligation of contracts, but this court seized the first opportunity presented and decided that the Constitution used the word "obligation" advisedly (Sturges *vs.* Crowninshield, 4 Wheat. 197; Ogden *vs.* Saunders, 12 Wheat. 269), and that mere annulments or breaches of contract were not within its purview.

> "The terms 'contract' and 'obligation,' although sometimes used loosely as convertible terms, do not properly impart the same idea. The Constitution plainly presupposes that a contract and its obligation are different things" (id. 316).

A contract is the meeting of the minds, but the obligation resulting therefrom does not depend upon the will of the parties, but upon the law and its remedies as they existed when the contract was entered into. Id. 317; Sturges *vs.* Crowninshield, 4 Wheat. 197. The Constitution intended to protect the obligation as it existed and was recognized by the laws in force when the contract was made. Ogden *vs.* Saunders, 12 Wheat. 327; McCracken *vs.* Hayward, 2 How. 612; Bronson *vs.* Kinzie, 1 How. 317.

The obligation, then, protected by the Constitution, is the binding force of any contract as recognized and sustained by the law, when incurred, since it is the law and its remedies which obligate a person to perform his agreement. McCracken *vs.* Hayward, 2 How. 612; Ogden *vs.* Saunders, 12 Wheat. 302; Cooley Const. Lim., 7 ed. 403.

The claim of impairment of the obligation of the supposed contract in this case is based upon the passage of a municipal ordinance by the city and proceedings thereunder, looking to the construction of its own waterworks, it being alleged, and so found by the court below, that under the contract the water company had the sole privilege to purvey water in the city.

The complainant did not even set up that the city ordinance was in pursuance of legislative authority; on the contrary, it admitted in effect that the act of the city was under *color of authority.*

A municipal ordinance, unless passed in pursuance of legislative authority, is not a law of the State within the meaning of the constitutional prohibition. Hamilton Gas *vs.* Hamilton, 146 U. S. 266; N. O. Water *vs.* Louisiana Sugar, 125 id. 31, 38; Lehigh Water *vs.* Easton, 121 id. 392; Mur

ray *vs.* Charleston, 96 id. 440; Williams *vs.* Bruffy, id. 183. A municipal ordinance not passed in pursuance of delegated legislative authority is not a State law within the meaning of the Constitution; to be such it must have the force of a State statute. N. O. Water *vs.* La. Sugar, 125 U. S. 31. The Constitution was aiming at the *legislative power* of the States and not at the acts of administrative boards, or doings of municipal corporations, and only on the theory of agency within delegated powers can an ordinance be considered a State law. Id. 18, 31, 38.

Further, the ordinance must have been in pursuance of a State statute taking effect subsequent to the date of the contract (McCracken *vs.* Hayward, 2 How. 612; Lehigh Water *vs.* Easton, 121 U. S. 391), or else, instead of being a State law, as contemplated by the Constitution, it would be in contravention of the State law. It needs no argument to demonstrate that a municipal ordinance, passed in *violation of the State law* as it existed at the date of the contract, *can not be considered a State law* within the aim of the Constitution. Defiance Water *vs.* Defiance, 191 U. S. 193.

If the city acted unlawfully, it is just as amenable to the laws and courts of the State as an individual.

If the contract obligated the city not to erect a competing system of its own, and the water company has performed as required, the obligations resting on the city remain unimpaired, and the laws of the State and the remedies for enforcing their performance have as much vital force now as they had before the city's refusal to perform.

The means for the enforcement of the obligations of the contract, viz, the laws and remedies which existed when the contract was made, constitute the breath of the contract (Edwards *vs.* Kearzey, 96 U. S. 600), and they have remained unchanged.

The judiciary system of the State is organized to promote justice, and was and is now open to the real complainant to force the city to fulfil whatever obligation it incurred.

Even if a State statute were involved, the question of its repugnancy to the inhibitory clause of the Constitution should be passed upon in the State courts in the first instance, and the presumption is that they will do what is required by the National Constitution (Chicago & Alton *vs.* Wiggins Ferry, 108 U. S. 18, 24; Shreveport *vs.* Cole, 129 id. 36; Bank *vs.* Minneapolis, 192 id. 381, 385; Kentucky *vs.* Stone, 88 Fed. 397), and if error supervenes, the remedy is found by writ of error under section 709 R. S. Defiance Water *vs.* Defiance, 191 U. S. 191, 194.

In the State court suit, no Federal question having been presented by the water company, the case was disposed of on other grounds broad enough in themselves to sustain the judgment which the State Supreme Court rendered, and, therefore, the jurisdiction of *this* court will not attach. N. O. *vs.* N. O. Water, 142 U. S. 79; Millingar *vs.* Hartupee, 6 Wall. 258; Lehigh *vs.* Easton, 121 U. S. 392. In the New Orleans case, there was a contract for commutation of taxes for water furnished the city, which the city repudiated as illegal. The matter went to the Supreme Court of Louisiana, which adjudged the contract void. Subsequently the city passed an ordinance making a new contract with the company for water. Taxpayers filed a bill alleging that this ordinance was a law impairing the obligation of the previous contract which gave the city the free use of water. This court dismissed the writ of error on the ground that the contract alleged to be impaired had been declared void by the Supreme Court of Louisiana. The governing principle of that case appears obviously applicable to the case at bar.

So long as the State law has not destroyed or diminished the legal duty to fulfil the obligation of a contract, it can not be said that there has been any State impairment of such obligation, and the issues raised by complainant do not arise under the Constitution (Fergus Falls *vs.* Fergus Falls Water, 72 Fed. 873), and to entertain jurisdiction

would constitute an encroachment upon the province and prerogatives of the State courts.

In Fergus Falls *vs.* Fergus Falls Water, 72 Fed. 873, the company brought action against the city alleging that the city had contracted to pay water rents for thirty years; that the company had complied with the contract and the city had paid the rentals until the council had passed a resolution annulling the contract and refusing to pay further rentals thereunder. The company alleged that the resolution was a law impairing the obligation of the contract, but the court held that the allegation was mere surplusage and did not make the action as one arising under the Federal Constitution, and that even if the averment had brought the case within the jurisdiction, the suit should have been dismissed when it appeared that it did not arise under the Constitution of the United States, but *was only a question as to whether the State had authority under the laws of Minnesota to enter into the contract.* Judge Caldwell, speaking for the court, said (p. 875):

> "The right to contract and the obligation of contracts antedate the Constitution and were not derived from it. An action, therefore, to recover upon the contract in suit, or to enforce its obligation, is not a suit arising under the Constitution. But it is said that the complaint sets up that the defendant, by resolution of its council, declared the contract null and void, and that this resolution impairs the obligation of the contract, and is in contravention of the Constitution of the United States. Conceding all this to be so, it does not serve to make the plaintiff's cause of action one arising under the Constitution. Notwithstanding this averment, it is indisputable that the complaint shows the plaintiff's suit is based upon, and arises out of, the contract in suit, and not under the Constitution. The plaintiff seeks, in its complaint, to inject a Federal question into the case by suggesting that the defendant will interpose as a defense to the suit a resolution of its council which impaired the obligation of the contract, in contra-

> vention of the Constitution. . . . The jurisdiction of the circuit court can not be invoked by any form of pleading in an action like this."

Judge Caldwell quoted the following from opinion of this court in N. O. *vs.* Benjamin (153 U. S. 424):

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, then it is not a suit arising under the Constitution." (Cases cited.)

In St. Paul Gas *vs.* St. Paul (181 U. S. 142), it was held that while an ordinance of a municipal corporation may be such an exercise of legislative authority as to be considered a law within the meaning of the Constitution, but authority to pass the ordinance must be predicated upon a *legislative act assigned to exist* before the Federal court could have jurisdiction to prevent the impairment of an alleged obligation. St. Paul had contracted with the gas company for street lights, and the company constructed a large number of street lamps as required by the city charter. Afterwards, by direction of the municipality, electricity was substituted for gas and the gas company was ordered to remove the unused lamp posts. The company asserted its right to recover the interest on the cost of placing the lamps, but the final judgment of the Supreme Court of Minnesota denied its right. A writ of error was prosecuted to the Federal court on the ground that the ordinance in legal purview amounted to action by the State impairing the obligation of the contract embodied in the State's charter by the legislature. This court dismissed the case for the want of jurisdiction, holding that the ordinance did not tend in any way to impair any obligation resting on the city to pay interest on the cost of construction since, *if the contract imposed an obligation to make such payment the duty of the city to do so was left unaffected by the order to remove;* that the refusal of

the city to pay in future the interest on the cost of construction—

> "was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment."

Mr. Justice White, in stating the opinion of the courts, said (p. 149):

> "When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

After distinguishing inapposite cases cited, Mr. Justice White continued as follows (p. 151):

> "As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legislative act is shown to exist from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court."

In Lehigh Water *vs.* Easton, 121 U. S. 392, this court

held that the constitutional prohibition of necessity referred only to State laws, passed subsequent to the date of the contract alleged to be impaired, and that the suit of the water company was based upon the erroneous idea that this court may review the judgment of a State court involving the *enforcement* of an obligation.

If we have correctly understood the principle of construction laid down by this court in the beginning and adhered to in all of its subsequent deliverances, the things complained of by the complainant relate not to the impairment, but to the non-performance of a supposed obligation, and since no Federal question could be thus involved, the suit should be dismissed.

The Exclusive Franchise Alleged.

Before entertaining jurisdiction, this court will first inquire into the chief matter in controversy here, and determine whether the city had the power to make a grant such as that alleged by complainant. Commissioner *vs.* Platt, 79 Fed. 571. If the city had no power to grant the exclusive franchise there was no obligation to be impaired, no Federal question involved, no equitable jurisdiction, and hence no cause of action.

This court has always held that before it can be asked to determine whether an obligation has been impaired by a State law the existence of a legal contract subject to impairment must be shown, and in order to constitute a violation of the constitutional inhibition against depriving a person of his property without due process of law, it should appear that such a person has a property in the particular thing of which he has been or is about to be deprived. N. O. Water *vs.* New Orleans, 142 U. S. 84, 88; Stone *vs.* Miss., 101 id. 814; Bankers *vs.* Minneapolis, 192 id. 381, 385; Giles *vs.* Teasley, 193 id. 160; Millingar *vs.* Hartupee, 6 Wall. 258.

The contract between New Orleans and the New Orleans Water Company was *ultra vires*, and there was no obligation to be impaired by the city ordinance in repudiating the contract.

In Augusta *vs.* Earle, 13 Pet. 595, Mr. Chief Justice Taney said:

> "Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the State."

A franchise is a sovereign prerogative which can only be vested, directly or indirectly, by legislative grant in pursuance of authority. Nat. Foundry *vs.* Oconto Water, 52 Fed. 29; Grand Rapids *vs.* Grand Rapids, 33 id. 659; Norwich Gas Light *vs.* Norwich Gas, 25 Conn. 38; Truckee and Tahoe County *vs.* Campbell, 44 Cal. 89; State *vs.* Weatherby, 45 Mo. 20; St. Louis Gas *vs.* St. Louis, 16 Mo. App. 72; Citizens' Gas *vs.* Elwood, 114 Ind. 332. Contracts creating monopolies are void, being contrary to public policy (2 Addison, 743; Greenhood Pub. Policy, pp. 180, 643, 670; Central *vs.* Collins, 40 Ga. 582), and are made void by the common law (7 Bacon's Abridg. 22; 6 Coke, pt. 11, p. 84), and a contract giving a practical monopoly is also void. People *vs.* Chicago Gas, 130 Ill. 295.

In National Foundry *vs.* Oconto Water Company, 52 Fed. 33, Judge Jenkins said:

> "It may be difficult to enumerate the common-law powers of a municipal corporation. It is certain, however, that the conferring of franchises upon other corporations is not one of them. Under its charter, by a well-known principle of law, it can exercise no power not expressly granted or fairly to be implied. . . . Dill. Mun. Corp., 4th ed. 27. Without like authority it can not grant the exclusive right to

> use the streets, and a distributing plant located in the streets is essentially a monopoly. The right to use the public highways for gas pipes or water mains rests in legislative authority directly granted or delegated to municipalities."

The promise by the city of Oconto was more definite than that of the city of Dawson, since it undertook, in the contract, to adopt and maintain an ordinance protecting the company in the *safe and unmolested enjoyment of the franchise* granted. The court held that it had no power to confer such a franchise for waterworks and for other things collateral thereto (see also Mt. Pleasant *vs.* Beckwith, 100 U. S. 524; Lee Tong, 18 Fed. 253; Western Union *vs.* Am. Union, 65 Ga. 160; Davis *vs.* Mayor, 14 N. Y. 506; Cooley Const. Lim., 7 ed., 401). In the case at bar the city never even made any such agreement and never promised not to erect works of its own, but the court below not only held that it granted the franchise, but it also *implied* a promise by the city not to erect works of its own.

Exclusive franchises are not favored by the law and will never be presumed or implied, and every statute which takes from the legislature its power will be construed most strongly in favor of the State and not to tie the hands of the public in respect to its future necessities. Detroit Citizens *vs.* Detroit Ry., 171 U. S. 48; Stein *vs.* Bienville, 141 id. 67; Wright *vs.* Nagle, 101 id. 791; Charles Bridge *vs.* Warren Bridge, 11 Pet. 420; Minturn *vs.* Larue, 23 How. 435; East Hartford *vs.* Hartford Bridge, 10 id. 511; Binghamton Bridge, 3 Wall. 75; Gilman *vs.* Sheboygan, 2 Black, 510; Goszler *vs.* Georgetown, 6 Wheat. 593; Central *vs.* Collins, 40 Ga. 619; Long *vs.* Duluth, 49 Minn. 280; Brenham *vs.* Brenham Water, 67 Tex. 554; Dillon, 97.

In Detroit Citizens *vs.* Detroit Ry., 171 U. S. 48, the city under statutory authority had exclusively authorized one company to construct and operate railways through certain

streets. Subsequently it granted to another company a similar right. The first grantee applied for injunction. Mr. Justice McKenna, in speaking for this court, said (p. 53):

> "It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the Constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exists considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

In Minturn *vs.* Larue, 23 How. 435, the legislature had conferred upon the city of Oakland the power to make and regulate ferries. "Exclusive" power was not expressly given, but seemed within the reasonable intendment of the charter, but the court held (p. 436) that that which was conferred in doubtful terms should be resolved in favor of the public and that the power of a municipality to grant an exclusive franchise should never be implied; that "this principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities." See also Freeport *vs.* Freeport, 180 U. S. 587.

A statute of Georgia authorized the inferior courts to confer franchises for ferries, but in Wright *vs.* Nagle, 101 U. S. 791, this court held that such courts were not empowered to grant exclusive franchises, on the ground that the State did not intend to tie the hands of the public with regard to its future necessities.

Mr. Justice Peckham, in stating the opinion of this court, in Skaneateles Water Co. *vs.* Skaneateles, 184 U. S. 363, said:

> "There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of the municipality, even in matters not immediately connected with water, to be left to implication."

In N. O. C. & L. R. R. Co. *vs.* New Orleans, 44 La. Ann. 728, the city had authority from the legislature to establish street railways, but the court held that no authority to grant exclusive privileges could be implied into the legislative grant, and that the attempt of the city to do so was *ultra vires* and not binding on subsequent city councils.

In Westerly Water *vs.* Westerly, 80 Fed. 611, the town had authority to grant a franchise for waterworks *on such terms as it might deem proper*, including the power to exempt the works from taxation, yet the court held that the town had no power to grant an exclusive franchise so as to deprive it of the right to construct a system of its own. Judge Brown said (p. 613):

> "The rights of the public, the rights of the town, are to be scrupulously regarded; and, though franchises to corporations are to be carefully protected, the source of such privileges must be traced either to the direct act of the legislature, or to the authorized act of the agent, acting clearly within the pow-

ers delegated by the legislature in express terms. Grants of exclusive rights such as the town council attempted to confer must rest upon the clearest language and upon the most definite authority, and persons dealing with public servants are strictly and justly held to the obligation to inform themselves as to the rights which they may acquire in so doing. All persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or of its officers to make the contract."

The Walla Walla case having been cited in opposition, Judge Brown explained that in that case the city had expressly, and with proper authority, agreed not to erect waterworks of its own, and that no attempt had been made to grant an exclusive franchise (see also Dillon, 4 ed. 447).

In Norwich Gas Light *vs.* Norwich Gas, 25 Conn. 19, the city had granted to one company for fifteen years the right to lay pipes in the streets, agreeing that no other person should by consent of the council lay gas pipes in the streets during said period. The court held that this was a grant to use the streets in the manner specified, but not to restrain others from a similar use which did not interfere with the works of the first grantee, and that the right to use the streets was not exclusive.

In Brenham *vs.* Brenham Water Co., 67 Tex. 542, it was held that the city had no power to grant the water company an exclusive right to furnish water for twenty-five years, though the charter expressly gave the city power to furnish water, which included power to contract with some other corporation for water supply; and that the contract pretending to grant such right being void, the city had the right at all times to declare it so; that a municipality can not delegate or barter away the powers conferred upon it for public purposes, and the city council had no power to cede away or embarrass its legislative or governmental powers by continuous contract or otherwise so as to disable it from the

proper performance of its public duties (see also Brick Church *vs.* N. Y., 5 Cow. N. Y. 540; Simplot *vs.* Chicago, 16 Fed. 350; Dillon, 675).

In Long *vs.* Duluth, 49 Minn. 280, the city had authority to grant the right to establish waterworks to supply the municipality with water and to make contract therefor, but it was held that this authority did not imply the power to grant an exclusive franchise so as to disable the municipal corporation for the period of thirty years from itself establishing waterworks and a system of supply.

In Syracuse Water *vs.* Syracuse, 116 N. Y. 167, one company charged that another company was proceeding to invade the franchise granted by its charter, but the court held (p. 178), citing authorities, that the grantee of such a privilege takes nothing by inference.

In Lehigh Water *vs.* Easton, 121 U. S. 392, by a State statute the water company acquired an exclusive right to supply the borough with water, and there was an express provision in the act against other incorporation for the same purpose. The water company sought to enjoin the borough from constructing waterworks and from appropriating money therefor. The Supreme Court of Pennsylvania dismissed the suit, holding that the right acquired was exclusive only against other water companies, and that the legislature did not by implication intend to prevent the borough from providing its inhabitants with water by means of works constructed by itself from money from its own treasury. This court held (p. 392) that it was for the State court to determine the question arising under the State contract, and that its judgment in such case was not subject to review (see authorities cited).

In New York, a company intending to engage in a public service must, prior to incorporation, secure the consent of the municipality within which it expects to operate. In re Brooklyn, 143 N. Y. 596, this consent was obtained and the water company incorporated. A contract was made with

the town by which the company was granted the right to purvey water during the term of its charter. The court held that the grant of an exclusive franchise to supply water was not implied by the terms of the statute authorizing incorporation for the purpose so as to preclude the municipality from obtaining water from other sources. The court further said (p. 616):

> "The legislature may not destroy or confiscate the property and franchise of a corporation; but it is not conceivable that the sovereign power can be restricted in its grants of corporate franchises, within constitutional limits, save by its own express agreement; even though the material consequences may be such as to entail loss, if not ruin, upon existing corporations through rivalry and competition. Those are risks, which if they can not be guarded against are assumed by the grantees."

No delegated power was pointed out by the complainant, or by the court below, which authorized the city to grant the exclusive franchise claimed, and such power not being expressly conferred, according to the overwhelming weight of authorities, must be denied.

The city was even without color of such power, because the legislature of the State had never even attempted to delegate it, and had it so attempted the grant would have been void, because expressly prohibited by the State constitution, art. 1, sec. 3, par. 2, which provides:

> "No law of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed."

An identical prohibition, section 23, article 1, in the Alabama constitution, was construed and applied by the Supreme Court of Alabama, in Birmingham & Pratt Mines Ry. *vs.* Birmingham Ry., 79 Ala. 465. The city gave to one company, in terms, an exclusive right along certain streets and

afterwards gave to another the right to occupy the same streets. The court held that the power to make the first grant exclusive did not reside in the municipality, and there was no equity to protect such grant. In discussing the constitutional provision, the court said (p. 473):

> "What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by the legislature? It seems plain from the very terms used, that the evil intended to be especially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law and are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic.
>
> . . . . . .
>
> "The exclusive right of the appellee to the privilege claimed, in our opinion, can not be sustained. The general assembly would itself have no power under the Constitution to make such a grant. *A fortiori*, a mere municipality would have no such power."

This same inhibition has been construed by this court in the case of the Bienville Water *vs.* Mobile, 186 U. S. 212, citing with approval the decision of the Supreme Court of Alabama (pp. 219, 223). The question before this court was one of revocation and amendment of a legislative grant, and speaking for the court, Mr. Justice Brewer said (p. 223):

> "As much force and effect must be given to section 23 as to any other, and it was obviously the intent that even if exclusive privileges were granted, the monopoly feature thereof should always be subject to revocation. In this section there is no suggestion of amendment or alteration. That which is distinctly provided is the absolute power of revocation. To hold that the exclusive feature of plaintiff's grant could not be revoked, because thereby injustice

> might be done to the corporators, is simply to nullify section 23."

It is true that the court below refused to decide whether or not the attempt to grant an exclusive franchise to the water company was valid for 99 years, but it did hold that it was valid and exclusive for twenty years or during the term the city agreed to take water. This conflicts with the opinion of Judge Jackson, in Grand Rapids *vs.* Grand Rapids, 33 Fed. 659, 676, who held:

> "If the power rests in the city council to grant an exclusive privilege for fifteen years, I can not understand why the grant may not under the same authority be conferred for any longer period that may be determined on. The *power* requisite to confer an *exclusive sovereign franchise* for fifteen years involves the right and operation of the same sovereign power which could make the grant for one hundred, or one thousand years, or in perpetuity. If the authority does not exist to make the grant for the longer period, it does not exist to confer it for the shorter; for it requires the possession of the *whole exclusive* power and control to grant either the one or the other."

Though the charter in this case gave the council power to make ordinances *deemed desirable* for lighting the streets, but not in express terms the exclusive power, Judge Jackson held that the city was not empowered by implication to confer an exclusive right to use the streets for wires for fifteen years, and that its attempt to do so was *ultra vires* and void. He also held that it was too well settled to need citation of authorities that municipal corporations, which are mere political agencies of the Government, can exercise only such powers as are granted in express words or fairly implied in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not merely convenient, but indispensable, and any fair doubt as to the existence of a power

must be resolved in the negative. See, also, Detroit *vs.* Detroit, 171 U. S. 48; Saginaw Gas *vs.* Saginaw, 28 Fed. 534; Los Angeles Water *vs.* Los Angeles, 88 id. 720; Omaha Horse *vs.* Cable Tramway, 30 id. 324; Jackson Horse R. Co. *vs.* Interstate Rapid Transit, 24 id. 306; Ill. Trust *vs.* Arkansas City Water, 67 id. 196; People *vs.* Chicago Gas Trust, 130 Ill. 283; Chicago *vs.* Rumpff, 45 Ill. 90; Treadway *vs.* Schnauber, 1 Dak. 236; Gale *vs.* Kalamazoo, 23 Mich. 344; Brenham *vs.* Brenham Water, 67 Tex. 553; Davenport *vs.* Kleinschmidt, 6 Mont. 527; Gaslight *vs.* Middletown, 59 N. Y. 228; Ohio *vs.* Cincinnati Gas & Coke, 18 Ohio St. 262.

In Saginaw Gas *vs.* Saginaw, 28 Fed. 529, the city had authority to cause the streets to be lighted, and under grant from the city the company claimed an exclusive right, but its claim was rejected by the court, which said (p. 535):

> "While there is great force in plaintiff's argument that individuals would not be likely to incur the great expense of establishing gas works and laying pipes without some assurance of a profitable and continued employment for a sufficient length of time to remunerate them for their outlay, we think the law is too well settled that this can not be done, without express permission of the sovereign power, to be now disturbed. If a grant of this kind for thirty years may be supported, why may it not by a parity of reasoning be upheld for a hundred years, or in perpetuity?"

This opinion also seems opposed to that of the court below in the case at bar, to the effect that the grant by the city of Dawson was exclusive for twenty years, though possibly not for ninety-nine.

Implied powers, says Judge Cooley (Const. Lim., 7 ed., 270), "are such as are *necessary* in order to carry into effect those expressly granted," and that (p. 271) "the reasonable presumption is that the State has granted in clear and unmistakable terms all that it has designed to grant at all."

See, also, Omaha Horse R. Co. *vs.* Cable Tramway, 30 Fed. 324; Saginaw Gas *vs.* Saginaw, 28 Fed. 534; Gas Light *vs.* Middletown, 59 N. Y. 228; Chicago *vs.* Rumpff, 45 Ill. 90; Illinois Trust *vs.* Arkansas City Water, 67 Fed. 196; Gale *vs.* Kalamazoo, 23 Mich. 344; State *vs.* Cincinnati Gas, 18 Ohio St. 262; Logan *vs.* Pyne, 43 Iowa, 524.

The very thing that the city of Dawson did not have the right to do was to deprive its inhabitants of the right to a competing water supply, and one council had no power to abridge the power of its successors to provide the municipality with a system of its own if needed and desired.

If, then, the grant by the city was not wholly void, in the light of the limited powers contained in the city's charter, the common law and the prohibition contained in the State constitution, it can not be construed to mean more than a promise that the exclusive right of the water company to the source of supply designated and to the particular ways and means established for the distribution of water would not be disturbed. Stein *vs.* Bienville, 141 U. S. 67; Hamilton Gas *vs.* Hamilton, 146 id. 268; Norwich *vs.* Norwich, 25 Conn. 19; Long *vs.* Duluth, 49 Minn. 280; and not as implying an agreement by the city that it would not grant a similar right to another company, or construct and operate its own system. Joplin *vs.* Mo. Light, 191 U. T. 150; Bienville *vs.* Mobile, 175 id. 109; id. 186; id. 212; Skaneateles Water *vs.* Skaneateles, 184 id. 354; Lehigh *vs.* Easton, 121 id. 392; Westerly *vs.* Westerly, 89 Fed. 611. In the Joplin case, the contract was authorized by a State statute and the plant was erected for public service at considerable expense, and was to be operated for twenty years. It was insisted that by implication from the statute and ordinance the city was precluded from erecting its own plant during the life of the contract, but this court held that there are presumptions against limitations upon the powers of government, and that there could be no such im-

plied contract in the ordinary grant of a franchise by a municipality. The circuit court had taken the opposite view and its opinion was the main precedent cited by the court below to sustain its conclusion that the contract made by the city of Dawson implied an agreement that it would not erect works of its own. The court below also cited the Walla Walla case (172 U. S. 1) in support of its position, but in the Joplin case this court reversed the circuit court and particularly distinguished the Walla Walla case as inapplicable; that in said case Walla Walla, in pursuance of a State statute, had contracted to take water, reserving the right to avoid the contract under certain contingencies, but until avoidance in the manner prescribed, the city had expressly agreed not to maintain waterworks of its own; that the contract was not objectionable, as there was no attempt to grant an exclusive privilege, and being otherwise innocuous and within the powers granted the city, it could only be avoided upon the judgment of a court of competent jurisdiction, the city having expressly agreed upon the method of avoidance. The decision of this court turned upon (1) a contract which the city was expressly impowered to make; (2) one innocuous of itself and not objectionable because of any attempted grant of exclusive privilege; (3) the ground that the city was bound to procure the nullity of the contract in the manner expressly agreed upon. None of these conditions obtain in the case at bar. The city council of Dawson had no legislative or popular sanction for its act, and it is pretended that an exclusive franchise was granted; its contract provided for a satisfactory supply of water and in the event of failure of such supply, the franchise of the company should, *from that fact*, be forfeited. The city reserved the right to determine for itself whether or not the water was supplied as required. If its act in renouncing the contract to pay rentals was unwarranted, its act was a mere breach for which the remedy

was at law. It was not the impairment of the obligation of a contract requiring equitable remedy. Raton Water *vs.* Raton, 174 U. S. 360; St. Paul Gas *vs.* St. Paul, 181 id. 142; Fergus Falls *vs.* Fergus Falls Water, 72 Fed. 873.

The other cases cited by the court below in support of the implication of agreement, viz: Louisville Gas *vs.* Citizens' Gas, 115 U. S. 683; St. Tammany Water *vs.* N. O. Water, 120 U. S. 64, do not touch the case at bar, because in these cases, the grant by the sovereign power of an exclusive franchise vested in the State became, upon performance of the public service required of the grantee, a contract protected by the Constitution of the United States. The very condition upon which was predicated these decisions is wholly wanting in the case at bar, and the countervailing presumptions of superior strength, so frequently referred to by the courts, preclude the presupposition, by legal fiction, of a valid grant.

This court, in reversing the circuit court in the Joplin case, removed the prop of the court below, which now appears to stand alone as the exponent of the doctrine of implication of exclusive privilege in the ordinary grant of a franchise by a municipality.

In further illustration of the presumption against limitations on the powers of government, we cite Stein *vs.* Bienville Water, 141 U. S. 67. Stein was granted "the privilege of supplying the city of Mobile with water from the Three Mile Creek for twenty years," and it was agreed that at the expiration of said term the city would purchase the waterworks, and until purchased Stein would—

> "have the exclusive privilege of supplying to the citizens and inhabitants of Mobile water from the waterworks aforesaid."

Stein constructed the system and maintained it in compliance with the requirements of the contract. However, another franchise for waterworks was granted to the Bien-

ville Water Company, and Stein's representative filed a bill to protect his exclusive right. Stein's grant was from the sovereign authority of the State, yet this court held that the contract did not prevent the city from granting a similar privilege to other persons during the twenty years, so long as the particular system and source of supply belonging to Stein were not invaded. In other words, the grant to Stein included only the exclusive right to a designated source of supply and to the employment of the particular instrumentalities adopted by him for the distribution of the water from that source.

In the cases cited and discussed, the courts refused to countenance the doctrine of implied authority to grant exclusive franchises even where such implications were within the reasonable intendment of the express grants, acting on the broad presumption, founded on a wise public policy, that a State withholds for the benefit of the people all that it does not grant in unmistakable terms, and does not intend to deprive itself of the power to perform its duty to the public.

If, for reasons of public policy, therefore, implied authority can not be read into a valid grant, *a fortiori* a "reasonable intendment" can not save an otherwise *ultra vires* contract made by the city of Dawson.

The court below found (Master's Conclusions of Law, No. 2, subd. 4) that the city did not *expressly* agree to deprive itself of the power to erect its own system of water supply, but decided that by "implication and reasonable intendment" it had agreed to do so.

The law does not use its force in upholding unlawful contracts, and an agreement by a municipality in contravention of the public welfare is void and confers no legal obligation, and to imply such a promise by the city is repugnant to the fundamental rule that the law will never imply any agreement or create any obligation in a contract contrary to law (Curtis *vs.* Fiedler, 2 Black, 478; Cary *vs.*

Curtis, 3 How. 236; Bryan *vs.* Page, 51 Tex. 535; Brady *vs.* New York, 16 How. Pr. 432), and a promise will not be implied against a municipal corporation where it could not contract expressly. Detroit *vs.* Robinson, 38 Mich. 108; Burrill *vs.* Boston, 2 Cliff. 590; Berka *vs.* Woodward, 125 Cal. 119; Zottman *vs.* San Francisco, 20 id. 105.

In Jackson County Horse R. Co. *vs.* Interstate Rapid Transit, 24 Fed. 306, Kansas City had granted to the grantor of the first-named company the exclusive right for twenty-one years for railways along the streets of the city. Subsequently the city granted to the Interstate Rapid Transit Company the right to operate railroads through certain streets occupied by the other company. This court held that the grant which purported to give an exclusive privilege was beyond the powers vested in the city and void. In rendering the opinion, Mr. Justice Brewer said (p. 309):

> "And if a direct grant from a legislature carries no implication of exclusiveness, why should it be presumed that the legislature intended to vest in a city the power to give exclusive privileges when it has in terms granted no such power? Will the power to create monopolies be presumed unless it is expressly withheld; that would reverse the settled rule of construction, which is that nothing in the way of exclusiveness or monopoly passes, unless expressly named. It will not do to say that the grant of general supervision and control of the streets carries with it, by implication, the power to give exclusive privileges, for that grant implies a vesting in the city of continuous control. It has no authority for surrendering its constant supervision and management to any other corporation or individual. It implies that the city today, tomorrow, and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, a thing that it may today surrender to the individual or to a private corporation the right of determining a score of years hence what the public may then

> need. . . . It is doubtless true, as counsel says, that capital is timid, and will not undertake such enterprise without abundant guaranties and undoubted security. But this suggests matters of policy, and presents considerations for the legislature. It does not aid in determining what powers have been granted, or in the construction of charters and ordinances. When the legislature deems that the public interests require that cities should be invested with powers to grant exclusive privileges, it will say so in unmistakable terms, as it has already done in some instances. Till then the courts must deny the possession of such power."

After referring to authorities, the justice concluded as follows (p. 310):

> "My conclusion, then, is that so much of the ordinance as purported to give exclusive privileges to the lessor or complainant was beyond the powers vested in the city of Kansas, and therefore void. It has no right, therefore, to challenge the validity of the ordinance giving defendant its privileges or to restrain defendant from building its road. Whatever of annoyance or inconvenience the latter's road may cause, passes among those consequential injuries which give no cause of action. It must suffer these just as the citizen who uses the street where its road is constructed suffers some annoyance and inconvenience, and occasional loss, still without any action against it. *Pro bono publico* all must suffer somewhat."

A person dealing with a municipal corporation is presumed to have knowledge of its powers, and is not entitled in law or equity to enforce any illegal contract made by the city. Gamewell *vs.* Laporte, 96 Fed. 664; Griswold *vs.* East St. Louis, 47 Ill. App. 482; Johnson *vs.* Indianapolis, 16 Ind. 227; Madison *vs.* Newsome, 39 Fla. 149; Suburban Electric *vs.* Hempstead, 38 N. Y. App. 359; Wallace *vs.* San Jose, 29 Cal. 180; Argenti *vs.* San Francisco, 16 Cal. 283.

Even negotiable municipal bonds where the power to issue never existed are invalid in the hands of innocent purchasers. Anthony *vs.* Jasper, 101 U. S. 693; Wells *vs.* Supervisors, 102 id. 625; Dixon *vs.* Field, 111 id. 83; Sutliff *vs.* Commissioners, 147 id. 230; Coffin *vs.* Commissioners, 6 C. C. A. 288; Daniel Neg. Inst., 5 ed. 1538.

A contract by a corporation which is *ultra vires* in the proper sense is wholly void and of no legal effect, the objection not being merely that the corporation ought not to have made it, but that it *could not* have made it. Such a contract can not be ratified by either party because it could not have been authorized by either, and no performance on either side, or action by the courts, can infuse such life into the contract as to found any right of action upon it, and if one of the parties refuses to proceed with a continuing contract which it had no power to make, no authority can be found under which it can be compelled to proceed. Pa. R. R. Co. *vs.* St. L. A. & T. H. R. R., 118 U. S. 317; Cent. Transp. Co. *vs.* Pullman, 139 id. 59; Cal. Bank *vs.* Kennedy, 167 id. 368; Jacksonville Ry. Co. *vs.* Hooper, 160 id. 524; McCormick *vs.* Market Bank, 165 id. 549; Pearce *vs.* Madison & Ind. R. R. Co., 21 How. 441; Zottman *vs.* San Francisco, 20 Cal. 106; Richardson *vs.* Buhl, 77 Mich. 632; Reese Ultra Vires, 68–78; Morawetz Corp. 581; and the word "unlawful" as applied to the purposes and acts of a corporation is not used exclusively in the sense of *malum in se* or *malum prohibitum*, but also to designate such powers as are *ultra vires*. See People *vs.* Chicago Gas, 130 Ill. 292. This doctrine also obtains in England. See cases cited in Cal. Bank *vs.* Kennedy, 167 U. S. 368. These authorities refer largely to private corporations which are voluntary organizations for individual profit of its component members. If no remedy can be found to force such aggregations to perform, under any circumstances, void agreements made for individual gain, but turning out unproductive, how, then, can justice fasten upon a municipality—an involuntary organization of

all the inhabitants within certain limits, including the lame, halt and blind, the insane as well as the sane, and infants as well as adults—an improvident, illegal, and exorbitant contract, in the very performance of which is involved a menace to the health, property and prosperity, of its people?

The court below refused to decide whether the city could grant to a third person the right to supply water, but held that equity would not permit the city, in view of its contract, to itself compete with the water company. This decision is not in harmony with the opinion of Mr. Justice McKenna, in the Joplin case (191 U. S. 156), where such a contention is effectually disposed of. After analyzing the position taken by the circuit court, the justice said:

> "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee . . . contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city can not, the city is left with a useless potentiality, while appellee exercises and enjoys a practically exclusive right."

The decision of the court below on this question is repugnant to public policy as manifested by the fundamental law of Georgia, and of the other States, as construed by the courts. Even where a State or municipality may grant a privilege which excludes competition from other parties, it does not deprive itself of its power to fulfill the object of its creation—the service of the public. Lehigh Water *vs.* Easton, 121 U. S. 392; Bienville Water *vs.* Mobile 186 id. 212; Skaneateles *vs.* Skaneateles, 184 id. 363; Joplin *vs.* Mo., 191 id. 156; Westerly *vs.* Westerly, 80 Fed. 611; Long *vs.* Duluth, 49 Minn. 280; Brenham Water *vs.* Brenham, 67 Tex. 542; Columbus Gas *vs.* Columbus, 50 Ohio St. 65; Church *vs.* New York, 5 Cow. (N. Y.) 540; and any contract which disables a corporation from performing the functions which it undertakes is void as against public policy.

Thomas *vs.* R. R., 101 U. S. 71, 82; Cent. Transp. Co. *vs.* Pullman, 139 id. 43; Cal. Bank *vs.* Kennedy, 167 id. 368; Wabash *vs.* Defiance, 167 id. 100; Macon St. Ry. *vs.* Macon, 112 Ga. 782; Dillon Mun. Corp. 97.

We say then that, whatever liability may have attached against the unfortunate city under one portion of the divisible contract, there is no jurisdiction, no exclusive franchise requiring protection of a court of equity, and the decree and judgment of the circuit court should be reversed and the bill dismissed.

Res Judicata.

A right distinctly put in issue and directly determined by a court of competent jurisdiction can not be questioned in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right once so determined must, as between the same parties or their privies, be taken as conclusively settled so long as the judgment in the first suit remains unmodified. This is the settled rule of *res judicata* as evolved from the numerous decisions of this court. S. P. R. R. Co. *vs.* U. S., 168 U. S. 1; N. O. *vs.* Citizens Bank, 167 id. 371; Lumber *vs.* Buchtel, 101 id. 638; Last Chance *vs.* Tyler, 157 id. 683; Stout *vs.* Lye, 103 id. 66; Cromwell *vs.* Sac, 94 id. 351; Des Moines *vs.* Iowa, 123 id. 552; Tioga *vs.* Blossburg, 20 Wall. 137; Cornett *vs.* Williams, id. 226; Aurora *vs.* West, 7 id. 82; Beloit *vs.* Morgan, id. 622; Linton *vs.* National, 104 Fed. 584; Holt *vs.* National, 80 id. 686; Commissioners *vs.* Platt, 79 id. 567.

The decisions of the State courts construing the local laws are binding on this court, whatever it may think of their soundness on general principle (Jeter *vs.* Howitt, 22 How. 352; Bank *vs.* Beverly, 1 id. 134, 148; Stanley *vs.* Coler, 96 Fed. 284; Oxford *vs.* Union Bank, id. 293), and the proceedings of a State court can not be collaterally attacked in the Federal jurisdiction. Tarver *vs.* Tarver, 9 Pet.

174; Fouvergne *vs.* N. O., 18 id. 473; Christmas *vs.* Russell, 5 Wall. 305; Peninsular *vs.* Eells, 68 Fed. 35.

By a judgment of a court of competent jurisdiction, the vitality of a contract is merged into the judgment; it ceases to bind the parties and all remaining liability is transferred to the judgment. No further action can be maintained on the instrument. Wayman *vs.* Cochrane, 35 Ill. 151; Leslie *vs.* Bonte, 130 id. 501; Freeman Judg., 216.

The judgment of the court in a suit for one instalment under a contract is conclusive with regard to the other instalments (Lumber *vs.* Buchtel, 101 U. S. 638), and so in a suit for railroad receipts with reference to subsequent tolls under the same contract. Tioga *vs.* Blossburg, 20 Wall. 137.

In New Orleans *vs.* Citizens Bank, 167 U. S. 371, the bank obtained a judgment in the State court, declaring that a tax assessment for a certain year was void. The successors in office to the board of assessors assessed a similar tax for a subsequent year. In a suit in the U. S. Circuit Court the bank set up the State court judgment as constituting *res judicata*. The tax collectors contended that though successors in office they were not privies to the former suit, and that there was no estoppel because a judgment decreeing the assessment for one year illegal could not be *res judicata* as to a future year. This court held that the contention based upon a mere change in persons was without merit, and that the estoppel resulting from the thing adjudged did not depend upon the same demand. After reviewing leading cases, Mr. Justice White, in speaking for the court, said:

> "It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.
>
> . . . . . .

> The very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same conditions between the parties or their privies. To admit judicial power on one hand and to deny on the other the very substance and essence of such power, is not only contradictory but destructive of the fundamental conceptions upon which our system of government is based."

The universal rule of *res judicata* is affirmed in paragraph 5233 of the Code of Georgia as follows:

> "A judgment is conclusive between parties and privies as to the matters directly in issue until reversed or set aside."

Privity.

The court below found in effect (Master's Conclusions of Law, No. 2, subd. 1) the rule of *res judicata* as we have stated it, and also that the judgment of the Supreme Court of Georgia was competent to conclude parties and privies (Stanly *vs.* Coler, 96 Fed. 284; Oxford *vs.* Union Bank, id. 293), but held that complainant did not acquire its right to litigate through the assignment of water rentals, made subsequent to the date of said judgment, but by virtue of the mortgage from the water company, given prior to the filing of the suit, and was therefore not privy to the State court suit so as to be concluded thereby, citing as applicable the rule that a mortgagee is not bound by a judgment against a mortgagor in a suit begun since the mortgage was made, unless mortgagee was a party or was represented by authority in the litigation. The general rule is as was stated, and it is axiomatic that if a mortgagee is not represented in a suit by the mortgagor the resulting judgment can absorb only the interest of mortgagor in the subject-matter of the suit, and can not impair any title or interest which passed by the mortgage from and *beyond the control* of mortgagor prior to the suit.

The governing principle of the rule, however, has been and can in reason only be applied to protect such fee or lien conveyed by the mortgage as could not be recovered or discharged, impaired or diminished, by any act of the mortgagor or of his creditors, such as actually existed in the cases cited by the court below.

If, therefore, the complainant acquired by its mortgage, subject only to discharge by the satisfaction of the entire debt secured, a permanent, unconditional, and indefeasible vested lien on the water rentals to accrue, and, without any action on its part or on the part of the mortgagor, the right in law to collect the rentals as they accrued, and was not in law represented in the State court suit, then the application of the rule by the court was just, as such right could not have been merged into the judgment.

On the contrary, (1) if the mortgage did not invest complainant, without foreclosure, assignment by the water company, or notice to the city, the right to collect the water rentals as they accrued, or, (2) if such right was invested, but nevertheless with complainant's approval, the water company, being in possession of the water system, was also left in control of the water rentals, or (3) if the lien on the rentals was discharged *pro tanto* by the payment of the interest accruing prior to the assignment of the rentals, then the complainant was bound by the judgment of the State Supreme Court, if not as party by representation, certainly as successor by the assignment of the cause of action, made subsequent to the date of the judgment.

In arguing this proposition we shall apply the law to such facts as are either set forth in the bill or not denied by complainant.

In the contract between the city and the water company the city agreed to attorn to such trustee for its bonds as the company might subsequently elect. There was never any actual attornment to the complainant, and if any contractual relation between it and the city was created through this

contract and the subsequent mortgage given by the company, it was never brought home to the city, since it never received any notice that complainant had acquired the right to collect the rentals. The contract left it optional with the water company to remain payee of the rentals to accrue, or to make the trustee to be created payee thereof.

The contract between the company and complainant is contained in the four corners of the mortgage given by the former to the latter. This court will undoubtedly give this mortgage legal effect, in accordance with the intention of the parties as manifested at the time, and prior to the filing of the bill. The parties will be presumed to have had in view that, under the laws of Georgia, a mortgage passes no title, and is regarded both in law and equity as merely a security for the debt incurred. Freeman *vs.* Bass, 34 Ga. 355; Frost *vs.* Allen, 57 id. 328; Hodge *vs.* Brown, 81 id. 277; Holliday *vs.* Lowry, 92 id. 680; Ward *vs.* Lord, 100 id. 408; Georgia Code, 1954 (2723); Huguley Mfg Co. *vs.* Galeton Mills, 94 Fed. 269; and that the lien of a mortgage is discharged by payment of the debt secured. Howard *vs.* Gresham, 27 Ga. 347; Brayley *vs.* Ellis, 71 Ia. 156; Olcott *vs.* Crittenden, 68 Mich. 230.

Where a mortgage is not deemed a conveyance of title so as to enable the mortgagee to recover possession without foreclosure and sale, the mortgagee has no right to take the rents before he has secured possession by actual foreclosure and sale according to law; and it is not in the power of the parties, even by express stipulation to give him such right (Thompson *vs.* Shirley. 69 Fed. 484). Instead of assigning the rentals to complainant or making it payee thereof in the mortgage, the right to the rentals was conveyed to complainant merely as security for the debt (Jones, Mort. 140), and having been expressly so done, the conveyance for security can not be construed as making the mortgagee the actual payee of the rentals (69 Fed. 484; Central Trust *vs.* Wabash, 30 id. 333). Under the instrument it was obvi-

ously within the intention of the parties that the water company was to be left in complete control, not only of the water system, but also of all rentals to accrue, and that the right of the complainant to collect the rentals would only accrue in case of default.

Furthermore, according to the bill, the city only agreed to pay rentals covering the twenty-year period from 1891 to 1911, while the mortgage debt incurred by the water company will not become due until September, 1916. It must be assumed that the parties acted in good faith and believed at the time that there would be no default either by the water company or the city, and, therefore, it was within their expectation that the water rentals would all be collected and disposed of long before the principal of the mortgage debt would be due. Prior to September, 1916, then, the only duty required of the trustee by the mortgage was to collect the accruing interest on the bonds. The resolution of the water company, recited in its mortgage to complainant, specifically provided that the water rentals were to be applied in payment of the interest on the bonds, and that the excess thereof, over the amount required for the interest, was to go to the treasurer of the water company. No other reasonable construction can be given to the intention of the parties than that the rentals were mortgaged to secure the payment of the interest, and for that purpose only, and that the mortgagor was to collect the rentals and apply them to its own uses so long as there was no default in payment of interest. Freedmen's S. & T. *vs.* Shepherd, 127 U. S. 494; Wilder *vs.* Houghton, 1 Pick. Mass. 90; Doug. 21.

This intrinsic construction of the mortgage is also supported by extrinsic evidence. The immediate subsequent construction of the instrument by the parties themselves should have controlling weight. At no time did the complainant give notice to the city, or set up any right to collect rentals, while at all times the water company claimed and

actually collected rentals until payment was demanded and refused in 1895. It brought suit for the instalments alleged to have accrued during said year, and constantly demanded the rentals until the adverse decision of the Supreme Court was rendered, whereupon the company promptly assigned a litigated right to complainant.

If the mortgage of the rentals was to secure payment of the interest on the bonds, the corollary is that payment of interest extinguished the lien as to any right to collect rentals which had already accrued (Howard *vs.* Gresham, 27 Ga. 347). From any point of view, the complainant could not have been clothed with the right to collect the rentals without notice to the city, foreclosure, or assignment by the company. It was in privity with the company because the relationship to the right to collect was mutual and successive. Central *vs.* Hazard, 30 Fed. 484; Bate *vs.* Gillett, 30 id. 687; Adams *vs.* Barnes, 17 Mass. 367; Leslie *vs.* Bonte, 130 Ill. 498; O'Connell *vs.* Chicago, 184 id. 324; 2 Black Judg. 549, 550; Freeman Judg. 162; Bigelow Estop. 142; 3 Bouvier Inst. 373; Herman Estop. 143–5; 1 Greenl. Ev. 523. The right of action did not spring from the mortgage. Whatever there was of it came through the assignment by the company. If the assignment was not wholly made after the decision of the Supreme Court of Georgia it was certainly until then incomplete.

When the bill was filed, complainant, as trustee for the bondholders, had no accrued money demand either against the water company or the city; all accrued interest on the bonds had been paid, and the court below so found (Master's Concl. of Law, No. 2, subd. 7, pr. rec. 110). It is not denied that the complainant took the naked assignment from the water company and undertook the suit, not at the instance of the bondholders, but upon the request of the water company and the American Pipe Manufacturing Company. If complainant had already, by virtue of the mortgage, an accrued legal demand as alleged, why was it deemed neces-

sary to secure an assignment before filing suit? Notwithstanding the admitted facts, it was successfully contended in the court below that there was neither mutual nor successive relationship between the water company and complainant to the right to the rentals. The interest in the right being identical, it is self-evident that both parties were estopped by the judgment. Having at the time of filing no accrued independent right of action, complainant's suit was without foundation.

The bill filed in this case was necessarily based upon the assumption that the proceedings in the Supreme Court of Georgia were a nullity. It is a bald attempt indirectly to bring within the jurisdiction of the Federal courts a question which, under the decisions of this court, can not be examined by them.

Even if the rentals had been conveyed as a security for the whole debt, and, conceding *arguendo*, the exaggerated claim of position of complainant as "alternative payee," which in any case was subordinate until asserted and recognized, still the judgment ought to be conclusive, since it is well established that where a mortgagee lies by and suffers the mortgagor, in possession, to remain in control, he is bound by the acts of the mortgagor until he intercepts the rentals (Wilder *vs.* Houghton, 1 Pick. Mass. 90, Doug. 21; Keyser *vs.* Hitz, 4 Mackey, D. C. 179), and the mortgagor is considered as agent, by implied authority, to receive the rents to pay the interest. Wilder *vs.* Houghton, 1 Pick. Mass. 90, Doug. 21. To the world except the mortgagee, the mortgagor is regarded as the owner of the mortgaged property, and as such is entitled to all the rents, even after default, until they are intercepted. Comer *vs.* Sheehan, 74 Ala. 452; Long *vs.* Wade, 70 Me. 359; Noyes *vs.* Rich, 52 id. 117; Argall *vs.* Pitts, 78 N. Y. 243; Bridge *vs.* Heidelbach, 94 U. S. 800. As the rent contract existed at the date of the mortgage, the complainant can only have the rights of the water company against the city. Jones Mort. 773, 774.

Where the rentals are specifically pledged as part of the security, the mortgagee has no claim upon them until he intercepts them by proper procedure. To avoid privity the rent must be actually assigned in the mortgage, and if the mortgage was given subsequent to the rent contract, as in the case at bar, attornment or at least notice would be necessary. Trulock *vs.* Donahue, 85 Ia. 748.

In Freedman's S. & T. Co. *vs.* Shepherd, 127 U. S. 494, it was decided that even though the income was pledged as security, the mortgagee had no right thereto until the mortgagor failed to perform the conditions of the mortgage.

In Gilman *vs.* Illinois, 91 U. S. 603, the railroad company gave mortgages to secure the bonds, quite similar to that given by the water company. It conveyed its roads, property, and franchises, "together with the tolls, rents, and profits," and the mortgagee was given power, upon default in interest, to take possession of all property conveyed. The company defaulted, but instead of taking possession as provided, the mortgagee foreclosed. A creditor of the company attached the rents and profits, and this court held that it thereby acquired a superior lien because the rents and profits rightfully and legally belonged to the mortgagor so long as he retained the legal title to the property and the right of possession; that, having failed to take possession, the accrued rentals were just as liable to the creditors of the mortgagor as if no mortgage existed. Notwithstanding the rentals were pledged, the mortgagee had no right thereto until he took possession. Mr. Chief Justice Swayne, speaking for the court, said (p. 616):

> "The mortgagor of real estate is not liable for rent while in possession. 2 Kent Com. 172. He contracts to pay interest, and not rent. In Chinnery *vs.* Black, 3 Doug. 391, . . . Lord Mansfield said, 'Until a mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profit made.' . . . Possession draws after it the right to receive and apply the income. . . . It was for the com-

> pany to decide what should be done with it. In this condition of things the whole fund belonged to the company and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist."

To similar effect, see Galveston *vs.* Cowdrey, 11 Wall. 459; Silverman *vs.* Northwestern, 5 Ill. App. 129; M. V. R. R. *vs.* U. S. Express, 81 Ill. 535; Curtis *vs.* Millard, 14 Ia. 130; Noyes *vs.* Rich, 52 Me. 115; Am. Bridge *vs.* Heidelbach, 94 U. S. 798.

It will hardly be contended that complainant's mortgage is stronger in legal effect than the ones involved in the case of Gilman *vs.* Illinois, cited *supra.* In that case, the mortgagee's interest, as well as the mortgagor's, in the rentals was merged into the creditor's judgment, though the mortgages were made prior to the judgment, and it follows that in the case at bar the relative right of the complainant and the water company was merged into the judgment favorable to the city. Wayman *vs.* Cochrane, 35 Ill. 151; Leslie *vs.* Bonte, 130 id. 501; Freeman Judg. 216. From a legal standpoint we can not conceive how the merger in one case could have a different effect from that in the other; the underlying principle is that the rentals belonged to the mortgagor and were subject to judgments against him. If complainant's claim to the rentals could have been defeated by the intervention of a creditor's judgment against the mortgagor, obtained since the mortgage passed, then it was inevitably absorbed by the judgment favorable to the city.

The principal difference between the judgments in the Gilman (and other cases) and the one under discussion, gives superior force to the judgment obtained by the city. In those cases, the *lien of the mortgagees* on rentals *had not been satisfied by payment of the interest* on the bonds. In the case at bar the *lien*, to say the least, is *naked*, the interest having been paid.

As we understand it, the rule of mutuality is that a judg-

ment must equally estop both parties or neither. 2 Black Judg. 548–9; Greenl. Evid. 524; Bouv. Inst. 2932, 3102; Litchfield *vs.* Goodnow, 123 U. S. 552. Applying this rule, and supposing the judgment had been in favor of the water company, would not the city have been concluded upon the issues decided? Could a taxpayer subsequently test the same question?

We say that, from every point of view of the law as applicable to the actual facts, the complainant was bound to the same extent that the water company was by the decision of the Supreme Court.

Stare Decisis.

In the suit between the water company and the city, the State Supreme Court held (106 Ga. 696–737) that the ordinance and notice for the election held on June 11, 1886, were insufficient to authorize a contract incurring an indebtedness. The court below found as a matter of fact (Master's Findings of Fact, No. 1, pr. rec. 85) that said election was not in the contemplation of the parties to the contract, and constituted neither authority nor inducement therefor. It is reasonable, therefore, to assume that the contention of complainant to the contrary will not be insisted on in this court, and we will take it as settled that the former city council entered into the contract without any popular sanction.

In the State court suit the question arose whether by the contract a debt was incurred which was forbidden by par. 1, sec. 7, or par. 1, sec. 10, of article 7 of the State constitution of 1877. Par. 1, sec. 7, reads as follows:

> "The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur

> any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation."

Par. 1, sec. 10, reads as follows:

> "Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government."

We shall direct our attention not so much to these provisions as to the decision of the Supreme Court, which is the constitution as applied to the contract, said court being the highest tribunal for the interpretation of the organic law of the State.

The case was argued and reargued, and we do not think in the history of judicial procedure in the State will be found a case where any question was more thoroughly and conscientiously analyzed and considered.

The gist of the decision is as follows:

> 1. Without preliminary sanction of a popular vote, as required by the constitution, a municipal corporation can not contract for a supply of water on the credit of the city for a longer period than one year; and a contract, which by its terms is to run for twenty years, each year's supply to be paid for semi-annually, is operative from year to year so long as neither party renounces or repudiates it.
>
> 2. Even if no legislation is necessary to authorize a municipal corporation to hold an election to determine whether a debt other than a bonded indebtedness shall be incurred, an election held pursuant

to an ordinance and notice, which do not state the amount of debt to be incurred, will not be sufficient to authorize a contract incurring an indebtedness.

3. Where one enters with a municipal corporation into a contract which is void because opposed to the constitution and laws of this State and contrary to its settled public policy, complete performance on the part of such person will not prevent the municipal corporation from pleading its want of power or the illegality of the contract.

4. The city has the right to make a contract for water supply for one year, provided it has in the treasury a sufficient sum to pay therefor, or if such sum can be secured by lawful taxation levied during the year in which the contract is made. While a contract for a longer period is illegal, yet, where the other party to such a contract has complied with his part, the city is liable for the amount stipulated in the contract for each year that it received the benefits thereof.

In arriving at these conclusions, the court exposed the underlying foundations of the constitutional prohibition, going far into the history of the conditions which led the framers of the constitution to prohibit municipalities from further imposing public burdens without popular sanction. It was shown that towns and cities in the State had, prior to the adoption of the constitution, been recklessly and improvidently loaded with debts, and that the very object of the people so burdened, speaking through the constitution, was to place a check upon the power of municipalities to incur such debts as that contemplated in the contract with the water company. The substructure of the decision may be summarized as follows:

1. That the word debt as used in the constitution is a liability which is undertaken and which must be discharged in future, but which is not to be discharged by a tax levied within the year in which the liability is undertaken.

2. That the very purpose of the framers of the constitution was to prevent an accumulation of lia-

bilities upon municipal corporations which could be enforced in the future by compulsory levy of taxes.

3. That the policy of the constitution was not only against incurring liabilities to be discharged in the future for services rendered concurrently with the liability incurred, or previous thereto, but equally against the incurring of a liability which is to be discharged in future, notwithstanding it may depend upon the performance of a service to be rendered in the future, and that an undertaking creates a debt within the meaning of the constitution if thereby the opposite party to the contract can, of his own volition, and without the consent and over the protest of the municipality, place upon it a liability which must be discharged by a tax levy in the future.

4. That without popular sanction, a municipality can not anticipate and fix liabilities beyond one year, or make any contract in which the other party would have the right by simple performance, to demand from year to year a discharge of the obligation, otherwise the framers of the constitution did only a vain and idle thing in placing the prohibition in the fundamental law.

5. That the very purpose of the constitution was to provide a system of finance for subordinate public corporations under which there should be each year contracts made for the expenses of the year, and each year's expenses should be paid by taxes levied during the year, and to prohibit, without popular sanction, any liability not to be discharged by money already in the treasury, or by taxes levied during the year.

The court also exhaustively reviewed its own decisions rendered since the adoption of the constitution, covering a period of twenty years, in which the question of prohibited indebtedness was raised, and reached the conclusion that its decision was not opposed to any previous decision rendered by it. It is true that the court overruled in part two of its previous decisions on the question, but it will be noted that they were on the same side of the question but applied more rigorously the inhibition.

The court below (Master's Concl. of Law, No. 2, subd. 2, pr. rec. 103) conceded that subsequent to the date of the contract in question, and beginning in 1892, the Supreme Court had unequivocally held that, without the required popular sanction, such contracts as the one in issue created debts prohibited by the State constitution, as illustrated in the cases of Cartersville Co. *vs.* Cartersville, 89 Ga. 683; Cartersville Water *vs.* Cartersville, id. 689; Lewis *vs.* Lofley, 92 id. 804; Habersham *vs.* Porter, 103 id. 613; Dawson *vs.* Dawson Water, 106 id. 696.

Then there is no dispute that this chain of decisions is in perfect harmony and governed by the same letter and spirit, and during the seven year period covered no decision could be found which deviated from the rule laid down. Inasmuch as these decisions were in construction of the fundamental law which had existed since 1877, the rule of *stare decisis* established became impregnable (Wells Adj. 597, 599, 602; Wilson *vs.* Ward Lumber, 67 Fed. 683), unless it can be shown that an *opposite* rule existed at the date of the contract in question. Stanly *vs.* Coler, 96 Fed. 284; Oxford *vs.* Union Bank, id. 293.

The court below found (Master's Concl. of Law, No. 2, subd. 2, pr. rec. 99–103) that the decisions in Georgia prior to the date of the contract had oscillated, and for this reason the later decisions were not binding on the Federal courts, and furthermore (id. 3) that such a contract did not create a debt was not an open question in that form, citing Walla Walla *vs.* Walla Walla Water, 172 U. S. 1, as *conclusive* (pr. rec. 104). This latter proposition is wholly new to us, and after exhaustive research we have been unable to find any case wherein it was held that the decision of this court construing a law of one State was conclusive in construing the constitution and settled policy of another. The right of each State to enact its own laws and formulate its own local policy was reserved in the Federal Constitution, and such right includes that to have them con-

strued by its own courts, and this right we believe will be recognized and upheld by this court. Wheaton *vs.* Peters, 8 Pet. 591; Smith *vs.* Kernochen, 7 How. 219; Pa. *vs.* Wheeling, 13 id. 519; Fairfield *vs.* Gallatin, 100 U. S. 47; Claiborne *vs.* Brooks, 111 id. 410; Bucher *vs.* Railroad, 125 id. 584; Detroit *vs.* Osborne, 135 id. 499. We are willing to concede to the citation the weight of the argument therein contained, and that the same chain of reasoning might lead the court to a similar conclusion in this case, provided the *manifested* policy of Washington is the same as that of Georgia; but we can not admit that the decision in that case precludes us from asking this court to determine the issue presented here in accordance with the constitution of the State under which it arose, it having held that different interpretations may be given in different States of laws even of a common prototype. Claiborne *vs.* Brooks, 111 U. S. 411; Randolph *vs.* Quidnick, 135 id. 463; Dempsey *vs.* Oswego, 4 U. S. App. 435; Christy *vs.* Pridgeon, 4 Wall. 203. In the Walla Walla case this court was not construing the settled policy of Washington as illustrated by the decisions of the State court construing a constitutional inhibition, but merely a limitation of indebtedness contained in the charter of the city of Walla Walla which had been expressly authorized by the charter to make the water contract which was in question, and the contract seemed reasonably within the declared purpose of the legislative grant.

Neither can we accept the court's interpretation of the Georgia decisions rendered prior to the date of the contract. It seems to us that the decisions themselves were misconceived, and if such analysis thereof had been made by complainant's counsel, we would have said that it is unfair.

The Constitution was adopted in 1877. The question of prohibited debt first came before the State Supreme Court in the case of Hudson *vs.* Marietta, 64 Ga. 286, which was decided May 7, 1879, in the atmosphere of the constitu-

tional convention. The court held that the city had no authority, without popular sanction, to incur a debt of $3,000 in order to exchange an old fire engine for a new one. Explaining the purpose of the framers of the constitution, the court said (p. 288):

> "The provision is inserted therein to stop, to dam up, this deluge of city and county debts which is flooding the country and sinking the best interests of the people."

The question next came up in Spann *vs.* Webster County, 64 Ga. 498, decided December 6, 1879, when it was held that the county could not levy a tax to buy a safe without the required popular assent. With regard to the object of the prohibition, the court said in part (p. 501):

> "It was the purpose of the framers of that constitution to tap the root of that system of indebtedness by counties, cities, and towns, which was growing into immense proportions and spreading mildew and blight everywhere over the land."

This decision was also rendered within the influence of the convention, and the court may have been over-zealous to apply the letter of the prohibition. At least the Supreme Court, in the case of the Water Company *vs.* Dawson, was more liberal, and in order to bring about uniformity, overruled in part, or qualified this decision, by saying that the safe might have been bought if it could have been paid for with surplus funds, or from a legal tax levied during the year of purchase.

In Butts *vs.* Little, 68 Ga. 272, it was held that a contract without popular sanction was void which provided for the erection of a building at a specified price, the payments for which were to be made as the work progressed, where the amounts were more than could be lawfully raised by taxation. After so deciding, however, the court set up a hypothetical case, and said that if the building could be paid for

in annual instalments by lawful levy, the injunction might be altered to meet the modification.

In Cabaniss *vs.* Hill, 74 Ga. 845, the court held that a contract was unlawful which created a debt in which the contractors agreed to accept $3,510 in warrants on the county treasurer in payment for doors, cells, sewer pipes, etc. This seems to have been another extreme interpretation of the inhibition, practically on all fours with the case of Spann *vs.* Webster County, *supra*, and it was qualified to the same extent in Dawson Water Co. *vs.* Dawson.

As oscillations the court cited the cases of Rome *vs.* McWilliams, 67 Ga. 106 ; Conyers *vs.* Kirk, 78 Ga. 480, and Lott *vs.* Waycross, 84 Ga. 681. In the first-named case the court was asked to enjoin a lawful levy of taxes to cover *anticipated* expenditure. No debt was created or intended to be created, and the assessment was for the purpose of avoiding an indebtedness. Strictly in accordance with the principle also laid down in the Water Company *vs.* Dawson, the court refused the injunction and held that there was no attempt to create an indebtedness. In the second case the court simply decided that a cash contract for lamps and gasoline, amounting to $57.10, was binding, having been made by the appropriate committee, which purchased the goods for cash. They were not paid for because the city treasurer happened to be out of town. It is obvious that the controlling principle in this case was the same as that in the Water Company *vs.* Dawson. The third case must be excluded from consideration by the very rule laid down by the court below, since the decision was rendered not before but subsequent to the date of the contract between the water company and the city. Besides, though the court was dealing with a ten-year contract, it only decided that the light company, having, under its contract, furnished the required lights, the city would not be enjoined from paying for the service out of the tax levied *during the year in which the water was used*, and this is just

what was also decided in the Water Company *vs.* Dawson. One Albertson had applied for an injunction to prevent the city from paying for the lights, and in disposing of the case the court expressly refused to decide whether the contract incurred an indebtedness which should have been submitted to the voters of the town, because it was not necessary to the adjudication of the case. See, also, Ford *vs.* Cartersville, 84 Ga. 216.

It will be seen that, barring Butts *vs.* Little, the governing principles of all the decisions are the same as those which controlled the court in Dawson Waterworks *vs.* Dawson. If the court's twenty-year construction is not to be recognized as a true manifestation of the policy of the State, it is because of the inharmonious note contained in the judicial *dictum* in Butts *vs.* Little.

The *exact* question raised by the contract in issue was never decided until August, 1892, but the animus of the constitution was made plain in the earlier decisions, and *the rule established prior to the transaction was more severe than that followed since.* There was never any oscillation as the word has been used by this court. The fact that the inhibitory provision was more unqualifiedly applied prior to the date of the contract in question, surely will not militate against the conclusiveness of the more liberal construction subsequently adopted and maintained. In the earlier decisions, the court below did find here and there *dicta* inconsistent with the practical uniformity of the decisions of the State court, but, as we understand it, that which is actually decided establishes the rule of *stare decisis.* If every such rule is to be impaled by any shaft of opinion not responsive to the issues actually decided, it might well be doubted whether any court has been or will be able to maintain such a rule upon any question so often raised over a long period.

The construction of the constitution of a State by its highest tribunal is regarded as a part of the statute, and is

as binding upon the courts of the United States as the text. Leffingwell *vs.* Warren, 2 Black, 603; Shelby *vs.* Guy, 11 Wheat. 367; McCluny *vs.* Silliman, 3 Pet. 270; Bank *vs.* Daniel, 12 id. 52; Ross *vs.* Duval, 13 id. 45; Harpending *vs.* Church, 16 id. 455; Porterfield *vs.* Clark, 2 How. 76; Luther *vs.* Borden, 7 id. 40; Massingill *vs.* Downs, id. 767; Nesmith *vs.* Sheldon, id. 812; Van Rensselaer *vs.* Kearney, 11 id. 297; Webster *vs.* Cooper, 14 id. 504; Christy *vs.* Pridgeon, 4 Wall. 196; Machine *vs.* Gage, 100 U. S. 677; Post *vs.* Supervisors, 105 id. 667; Claiborne *vs.* Brooks, 111 id. 410; Fisk, 113 id. 720; Detroit *vs.* Osborne, 135 id. 499. This is the general rule and no other could be "adopted with any regard to propriety" (Beauregard *vs.* N. O., 18 How. 502), and—

> "otherwise we should have the strange spectacle of two different tribunals, having coordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State without any power to arbitrate between them. . . . As a matter of propriety and right the decisions of the State courts on the question as to what are the laws of the State is binding upon those of the United States." Ottawa *vs.* Perkins, 94 U. S. 268.

It has been adhered to with "marked tenacity." Ill. Trust *vs.* Arkansas City, 76 Fed. 279; Madden *vs.* Lancaster, 27 U. S. App. 535. "It belongs to the State courts to expound their own statutes." Smith *vs.* Kernochen, 7 How. 219; Boyd *vs.* Ala., 94 U. S. 649; M'Keen *vs.* Delancy, 5 Cranch. 32. If the highest courts of two States arrive at different conclusions concerning a statute common to both, this court will give preference to the ruling of the court in which the contract was made and to be executed. Randolph *vs.* Quidnick, 135 U. S. 463. It has felt constrained to overrule its own construction to follow that of the State court of which it was not aware in the first instance, notwithstanding the transaction involved was made prior to the decision

of the State court. Fairfield *vs.* Gallatin, 100 U. S. 47; Green *vs.* Neal, 6 Pet. 291; Nesmith *vs.* Sheldon, 7 How. 818; Suydam *vs.* Williamson, 24 id. 427. It will follow the latest settled adjudications (Wade *vs.* Travis, 174 U. S. 508; U. S. *vs.* Morrison, 4 Pet 124; Polk *vs.* Wendell, 9 Cranch. 98), and regardless of its opinion as to their soundness. Tioga *vs.* Blossburg, 20 Wall. 137; Walker *vs.* State, 17 id. 651. It is the course of duty and prudence, especially in cases of difficult distribution, to yield rather than to encroach. Fullerton *vs.* Bank, 1 Pet. 614. This general rule has been followed from the earliest period (Brown *vs.* Van Braam, 3 Dall. 344; Elmendorf *vs.* Taylor, 10 Wheat. 159) to the present. Fallbrook *vs.* Bradley, 164 U. S. 154; Oakes *vs.* Mase, 165 id. 364; Aberdeen *vs.* Chehalis, 166 id. 444; Forsyth *vs.* Hammond, id. 518 (Burgess *vs.* Seligman distinguished, p. 520); Nobles *vs.* Georgia, 168 id. 404; Sioux City *vs.* Trust Co., 173 id. 107, 112; Wade *vs.* Travis, 174 id. 508 (limitations distinguished, p. 509); M., K. & T. *vs.* McCann, id. 586; Hartford Fire *vs.* Chicago, 175 id. 100–108; Tullis *vs.* Lake Erie, id. 353; Bergman *vs.* Bly, 66 Fed. 43; Andrews *vs.* National Foundry, 76 id. 166; Madden *vs.* Lancaster, 12 C. C. A. 570; Dempsey *vs.* Oswego, 4 U. S. App. 435. In many of these cases single decisions of State courts were followed. The rule has particular force where the State court has construed a constitutional limitation as to debt or the constitutionality of State legislation under which a debt was incurred. Sioux City *vs.* Trust Co., 173 U. S. 112; Wade *vs.* Travis, 81 Fed. 742; Stanly *vs.* Coler, 96 id. 284; Oxford *vs.* Union Bank, id. 293; or local public policy affecting the extent and character of powers of municipalities which are particularly within the domain of State control. Forsyth *vs.* Hammond, 166 U. S. 506; Claiborne *vs.* Brooks, 111 id. 410; Detroit *vs.* Osborne, 135 id. 499; Hartford Fire *vs.* Chicago, 175 id. 91; Sioux City *vs.* Trust Co., 27 C. C. A. 77; O'Brien *vs.* Wheelock, 95 Fed. 905; Stanly *vs.* Coler, 96 id. 284; Oxford *vs.* Union Bank, id. 293.

In 1896, in Fallbrook *vs.* Bradley, 164 U. S. 154, this court held that when a suit is brought by a citizen of another State, claiming that an act is about to be done in violation of the Constitution of the United States, the Federal courts have jurisdiction, but in exercising it as to questions arising under the State constitution, it is their duty to be guided by the decisions of the highest court of the State. Mr. Justice Peckham said (p. 155):

> "We should not be justified in holding the act to be in violation of the State constitution in the face of the clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we are deciding principles of general constitutional law. If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it, but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest court upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

The court below found (Master's Concl. of Law, No. 2, subd. 2, pr. rec. 99–103) that it was under no obligation to follow the general rule, because the decisions of the State court prior to the date of the contract had not established a settled rule, thus leaving the question at large. We think by our analysis of the earlier decisions we establish the contrary, but the decision of the court forces us to assume, for the sake of argument, that in effect no decision was rendered prior to the date of the contract. We shall therefore proceed upon this assumption, believing, as we do, that even in such case the position of the court is untenable and not warranted by any departure of this court from the general rule announced.

The first radical departure from the general rule seems to have been in the case of Gelpcke *vs.* Dubuque, 1 Wall. 175.

In that case the court declined to follow the latest State decision which had overruled a long line of State court decisions, covering a period of six years, which had established a rule of property under which the transaction in question had taken place. The court intimated that it might follow "the latest *settled* adjudications," but—

> "it can not be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. . . .
>
> "The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety."

The underlying principle of this decision was that where a contract when made was valid in accordance with an existing rule of property, established by the State court, this court would not follow a change of judicial decision which amounted to an alteration of the law and a violation of the contract obligation. Though this departure certainly seemed justified, it evoked a strong dissent from Mr. Justice Miller (pp. 207–220), who charged that it was an advance in the usurpation of the right which belonged to the State courts to decide as a finality upon the construction of State constitutions and State statutes. It also provoked criticism and protest from the State court. McClure *vs.* Owen, 26 Ia. 249–59.

Since that time (1863) numerous further exceptions to the general rule have been made, but if sifted of *dicta*, we think it will be found that the principle which moved the court to make the exception in Gelpcke *vs.* Dubuque is the common foundation for most subsequent limitations. Referring particularly to this court, and not to the circuit courts, we believe that the subsequent leading case of Burgess *vs.*

Seligman, 107 U. S. 20, marks the extreme limit of departure from the rule. In that case, no decision had been made by the State court on the question involved when it came before the United States Circuit Court and was decided. The State court afterwards took an opposite view, and under this particular condition this court followed the prior rule of construction laid down by the circuit court, saying:

> "So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of decision, or when there has been no decision of the State tribunals, the Federal courts properly claim their right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid any unseemly conflict with the well-considered decisions of the State courts."

It seems plain that what moved the court in this case to decline to follow the State court was not that there had been no decision prior to the transaction, but because the *Federal court had first acquired jurisdiction and construed the law prior to action by the State court*, and if any rule was intended to be laid down by this court it was to the effect that where a Federal court first obtains jurisdiction and decides an issue, a subsequent adverse decision by the State court will have the effect only of setting the question at large to be decided independently of precedent, though leaning toward an agreement of views with the State court if the issue be balanced in doubt.

The conditions upon which the decisions turned and the

language of the court itself show that the cases were considered as exceptional, and that it was with regret that the court felt itself forced to reject the construction of a State law placed upon it by the State court, and it is not to be believed that it was intended to establish, as some of the circuit courts seem to think, a general rule to the effect that if the exact question involved in a transaction had not been determined prior to the transaction, the Federal courts are to exercise their untrammelled judgment in total disregard of a well settled course of State decisions rendered in other cases setting at rest the identical question in issue.

Pretermitting the constitutional reservation of the States, and reasons of comity, there are other cogent reasons why such could not have been the intention of this court. Such rule would be (1) repugnant to the fundamental maxim of *stare decisis, et non quieta movere*, as recognized for centuries; (2) to impeach the ability of the State judges to perform the particular functions of their office; (3) opposed to the overwhelming weight of decisions of this court covering the entire period of its existence; (4) unwarranted by the reason and spirit of the exceptions themselves upon which the supposed rule is predicated.

The definition of the maxim sustains our first proposition unless it can be demonstrated clearly that the decisions of the State court are radically wrong in principle. The presumption is that the State court is peculiarly familiar with the local law, and best qualified to interpret it. (Elmendorf *vs.* Taylor, 10 Wheat. 159), and to be overcome the demonstration should be axiomatic. With regard to the second proposition, the establishment of such a rule would be to raise the presumption that State courts habitually construe the local laws erroneously and, therefore, that before their decisions can be admitted to have binding effect, contracting parties must have notice of what are likely to be alterations and not proper constructions of the law. The reverse is true and, ordinarily, parties are presumed to know the

law and are bound thereby, and a proper construction is not a change in law—it relates back to date of enactment. The third proposition is sustained by the references already given. Other decisions could be cited, if necessary. The fourth proposition is sustained by an analysis of the condition in each case which caused the departure from the general rule.

The exceptions to a general rule do not make a new general rule. The effect of each exception must be fastened to its own cause, and before a circuit court would be justified in ignoring a long line of settled decisions of a State court there should be a condition at least somewhat analogous to some one of the conditions which exist in the many cases in which this court felt constrained to reject the conclusions of the State courts. We believe that this court has not in any case, where the conditions were analogous to those in the case at bar, departed from the general rule, and the very conditions which existed in the exceptional cases and the reasons for departure will preclude this court from refusing to follow the construction of the State court of the law involved in the case at bar. For instance, in Gelpcke *vs.* Dubuque, and similar cases, a settled series of State court decisions were followed in preference to a later conflicting decision. For stronger reasons, this court will follow the chain of decisions of the Georgia court, not only that they are the latest, but also that they are not in conflict with any decision of the court. In view of Burgess *vs.* Seligman, and similar cases, the court will logically follow the Georgia lead because the conditions are exactly reversed, since it was conceded by the court below that on the question in the case at bar the State court had adopted the settled construction eleven years before the Federal court rendered any decision thereon. Besides, in the case at bar there is a settled series to follow, while in Burgess *vs.* Seligman there was only one case with the State court decision adverse.

We therefore say that the very reasons for departure from

the general rule show that the settled construction of the Georgia court should govern, and that the circuit court was unwarranted in disconnecting from a certain condition a short conclusion which was based upon the particular condition, and apply it to the case at bar, where there is no such basis for a similar predication.

Though constrained in many cases by exasperating conditions to reject the conclusions of State courts, in making such exceptions to the rule this court has always expressed its determination to avoid, if possible, any unseemly conflict with well-settled decisions of the State courts, and to agree with the view of the State court if the question is balanced in doubt (see Freeport Water *vs.* Freeport, 180 U. S. 597, referring to Burgess *vs* Seligman, *supra*). In the case at bar we say that from the very nature of the issue and the fact that it was decided in the same way in several cases during such a long period raises an impregnable presumption of correctness, or the conditions are at least sufficient to balance the question in doubt in the mind of this court.

The other cases decided by this court, cited by the court below, are easily distinguished from the case at bar. In Shelby County *vs.* Bank, 161 U. S. 149, the decisions of the Supreme Court of the State on the question at issue were conflicting and unsettled, as they were in Gelpcke *vs.* Dubuque, *supra*. In L. & N. *vs.* Palmes, 109 U. S. 244, the decision of the Supreme Court of a State was directly under review and the question to be decided was whether the effect given a law which, in violation of the constitution, impaired the obligation of a contract. The same may be said of Vicksburg *vs.* Dennis, 116, U. S. 665, and of Mobile *vs.* Ohio, 153 U. S. 486. It seems clear that none of these cases can be cited with propriety as a precedent for the action of the court below.

We say, as held by the Supreme Court of Georgia, that the constitution manifested a plain purpose to prevent an accumulation of liabilities upon municipal corporations,

and that it contemplated yearly contracts for the expenses of each year, and annual settlements of all liabilities incurred without popular sanction. To say that it had in view only bond issues and unconditional liquidated promises, is to construe the purpose and intent out of the constitutional inhibition. Such construction must be avoided. Lake *vs.* Rollins, 130 U. S. 666, 672. If an agreement by a city to pay upon the performance of a condition was not within the purpose of the prohibition, then, as well said by the Supreme Court, the framers of the constitution did "only a vain and idle thing" in placing the clause in the fundamental law, since it merely has the effect of unreasonably restricting the manner of incurring, and not the incurrence of liabilities. If the city could make a twenty-year contract for water, only severable by breach on the part of one or the other of the parties, what is there to prevent it from incurring every manner of liability? It could, within supposed limitations, by agreeing to pay upon performance, erect buildings, build railroads, make donations, and engage in all kinds of enterprises for the supposed welfare of the inhabitants, without their consent, and over their protest.

The ultimate finding of the court below on the question of debt is not entitled to consideration. It found that the contract did not incur a prohibited debt, but in a subsequent, ultimate conclusion it found in effect that it did incur such debt, and therefore the conflict in findings sets them at large. We will refer more particularly to the antagonistic findings under "recovery," *infra*, mentioning here the fact that the Master finds a debt for water rent for the year 1911, recommends a judgment therefor and a decree for specific performance of payment.

Revocation.

The court below found, among other things (Master's General Concl., No. 5, pr. rec. 113), that the franchise of the water company could not be revoked by the city in its own

interest. There is not a scintilla of evidence of record to show that the city ever attempted to revoke such franchise, nor was any such issue raised by the pleadings. The finding of the court was gratuitous and foreign to the issues, and we will not be expected to more than call attention to that fact.

Recovery Contrary to Law and Evidence.

The court below found (Master's Concl. of Law, No. 2, subd. 3) that the contract between the city and the water company did not create a debt within the meaning of the State constitution. This ultimate conclusion was predicated as follows (pr. rec. 104):

> "If the water company should fail to perform the service, the city would be under no obligation to pay. In no event was it liable to pay any instalment until the service for which the payment was due had been rendered."

As to the facts the court found (Master's Findings of Fact, No. 9, pr. rec. 91) that at times the company's reservoir leaked; that sufficient pressure was not constantly maintained, and (finding No. 8, pr. rec. 90) that the water supply was not protected from surface drainage from residences and from slaughter-pen offal, and that only at certain seasons of the year was the water safe, while at other seasons it was muddy and contaminated by said drainage. It also found informally (Master's Concl. of Law, No. 2, subd. 5, pr. rec. 107) that the company had not complied with the requirements as to pressure, yet its ultimate conclusion was that the city could not "invoke a forfeiture, nor can it plead the facts as a defense to the right of the complainant to relief." There is no relative consistency between all these conclusions. In one the court finds that no debt was created, because there was no liability to pay until performance. In another, that the water company did not perform its contract, and yet its ultimate conclusion was that the

city was unconditionally bound to pay and was not entitled to plead failure of performance. These antagonistic conclusions of law can not both be correct, and if either is wrong the complainant has no case. If there was no debt incurred, for the reason stated, then the complainant is not entitled to recover, because the water company failed to earn the instalments. If the obligation was such that it could not be broken by failure to perform, then the reasonings of the court as to the debt are set at naught, for the debt was, in such case, inevitably one prohibited by the State constitution.

We say that before the complainant can recover it must appear (1) that the city had the power to make the contract; (2) that it did make it; and (3) that the water company performed. Commissioners *vs.* Platt, 79 Fed. 571. If the contract was illegal complainant can not recover. Gibbs *vs.* Gas, 130 U. S. 396; Central Transp. Co. *vs.* Pullman, 139 id. 24; Oliver *vs.* Gilmore, 52 Fed. 565; Cedar Rapids Water *vs.* Cedar Rapids, 9 Mun. Corp. Cas. 101; Burrill *vs.* Boston, 2 Cliff. 590; Law *vs.* People, 87 Ill. 385; Griswold *vs.* East St. Louis, 47 Ill. App. 482; Wallace *vs.* San Jose, 29 Cal. 187; Bishop *vs.* Palmer, 146 Mass. 474; Arnot *vs.* Pittston, 68 N. Y. 558. Assuming *arguendo* that the string will be found to bind the city to the contract, still it was incumbent upon complainant to prove substantial performance by the water company of the contract both as to pressure and as to quantity and quality of the water supplied. Winfield Water *vs.* Winfield, 51 Ks. 104; Farmers' L. & T. Co. *vs.* Galesburg, 133 U. S. 156; Walla Walla *vs.* Walla Walla, 172 U. S. 1; St. Cloud *vs.* Water, 9 Mun. Corp. Cas. 473; Boyes *vs.* Green Mountain, 3 Colo. App. 295.

It is necessary to find what the contract was before it can be ascertained whether it has been performed. This court will doubtless construe the contract in accordance with its declared object. The principal object was to supply water for "domestic, sanitary, and other useful purposes," the users

of the water to pay such rentals as prescribed or agreed upon. The incidental object was fire protection, and the city promised to pay a stipulated price for license to use the water in fire emergencies. The city gave the water company permission to use the public streets for the purpose of distributing water to consumers. In consideration of the permission and of the stipulated rentals agreed to be paid, the water company agreed to construct and maintain a *complete and thorough system of waterworks* for the purposes described, and to erect and maintain a reservoir of sufficient height to produce such pressure on the mains that *from any hydrant on the principal streets* a stream of water would be projected fifty feet in still air through one hundred feet of hose and one-inch nozzle.

The corollary of the principal object of the contract is that the water company obligated itself to furnish water reasonably *suitable* for the purposes intended. It was necessarily implied that "a complete and thorough system of waterworks" for the declared purposes would supply such water. Yet the court found (Master's Concl. of Law, No. 2, subd. 5, pr. rec. 107):

> "The quality of the water is the same as it was during the years the city accepted it as satisfactory. The water shed and its condition was substantially the same then as now. There is no requirement in the contract that the water should be other than that furnished in its natural state from the source of supply designated by the city. It was not required that the water should be filtered, or otherwise rendered more fit for domestic use."

We say that it appears that the court throughout the hearing of the cause labored under the delusion that the waterworks were built for the city; that the city issued its bonds to pay for them, and upon acceptance of the system as stated, was thereby estopped from pleading any failure. The city was not the purchaser of these waterworks, and the

result of *caveat emptor* does not apply. When the city accepted the system, as stated, conditions were favorable and the water sample satisfactory. Acceptance in such case has never been and will not be construed as an estoppel, since the obligation to furnish a proper supply of water was a continuing one, and the acceptance upon which so much stress has been laid was simply to determine the time when the water rents were to begin, and all of this has been settled. Farmers' L. & T. *vs.* Galesburg, 133 U. S. 156.

In that case the court said (p. 170):

> "Whether or not the water company was able to furnish the required quantity of water every twenty-four hours, and whether or not its quality as to purity and goodness for domestic and other uses was in compliance with the ordinance, must rest upon the facts as proved to exist. Moreover the estoppel, so far as it did exist, was not a continuing one. The obligation of the water company to furnish the quantity and quality of water required by the contract was a continuing obligation. . . . There was not and could not be a final and absolute acceptance of the waterworks by the city, without regard to a future compliance on the part of the water company with the requirements of the contract. The case was not one of works constructed for the city, and to become its property upon acceptance; and the acceptance related merely to the sufficiency of the structures for fire service at the time."

It has also been held that the duty to furnish water of proper quantity and quality is a continuing one, and the city is not estopped by the fact that it accepted water during a number of years. St. Cloud *vs.* Water, 9 Mun. Corp. Cas. 473.

The finding that the condition of the water had not changed is wholly at variance with the evidence (see brief of testimony, under specification 64, and also of J. P. Allen, engineer of waterworks, under 66). It was shown that the scaffold and slaughter pen were established and maintained

after the selection of the source of supply; that the water was contaminated by drainage from offal from the slaughter pen, and from surface closets, which were beyond the jurisdiction of the city, and that, after full notice of the causes of the contamination, the water company failed to protect the water. Physicians testified that the water was unfit for drinking purposes. One tested it for a year by letting a pitcher full stand over night. The water was nearly always offensive in the mornings. It putrified during the night, a result not obtained with good water. When the old tank was torn down (since the filing of the bill), the bottom was covered with foul, muddy sediment four inches deep. On one occasion, within fifty yards of the mouth of the water pipe, a dead horse was found in the stream, in the last stages of decay. This was outside of the city limits. The water tank became a perch for buzzards, and several of them were found drowned in the tank. Citizens would not use the water for drinking purposes, and the supply, such as it was, was not always sufficient for irrigating and was at times cut off. For more than five years the public school had refused to use the water, and had to have other water hauled until an artesian well could be established. From undisputed evidence it was established that the water furnished to the citizens of the municipality for domestic and other useful purposes was filthy, stinking, and so offensive as often not to be fit even for washing or bathing purposes, and at times it could only be used for sprinkling lawns and gardens, and that the supply for this purpose was uncertain.

It is submitted that the obligation of the water company was not simply to have, at a particular time and under favorable conditions, water suitable for the purposes of the contract, so as to successfully stand a test, but it was its imperative duty to furnish habitually water suitable for the required purposes, and that it failed to perform its obligation by permitting the water to become so contami-

nated as to be unfit for use, and when unfit in its natural state, it was its duty, under the contract, to cleanse and purify it in some way before supplying it to the citizens who were paying therefor. The court's application of the doctrine of estoppel would have the effect of putting every such city in the power of its water company, as the latter could by simulated compliance with its contract reap the benefits due only to substantial performance. By such doctrine, the inhabitants would not only be deprived of such water as they are entitled to demand, but such performance as that of the company would be a constant menace to the health of the inhabitants and the safety of their property.

In finding the incidental object of the contract, the court will presume notice to the parties of matters of common knowledge, one of which is that fires occur without warning, and another that water pressure in a horizontal main is lowest where the friction is greatest. A pressure that will throw water only fifty feet high is very low for efficient service, but as the contract required such minimum pressure at *any* hydrant, it necessarily meant at the hydrant where the pressure was lowest, and contemplated a higher pressure wherever the friction was less. As fires occur without notice the very essence of the agreement was that the required pressure should be constantly maintained. Our construction of the contract is so obviously within the expressed intention of the parties that we would not advance such plain propositions were it not that the decree of the court below was fabricated upon views of the contract wholly opposed.

The conclusions of the court below were based upon the theory that the water system was constructed in accordance with specifications, and having been accepted, the city could only prove failure of performance by evidence that the tank was not kept filled, or from leaking, or that otherwise it would be necessary for the officers of the company to be notified of any test to be made so that the tank could be

filled and the system otherwise prepared to produce a *maximum* pressure under favorable conditions. To illustrate, a day or so after the water system had failed to prevent the burning of three houses in 1897 (see brief of testimony of A. J. Baldwin, specification 66), the superintendent of the waterworks, Mr. Horsley, gave notice that he would make a pressure test. He was furnished with one hundred feet of new hose and one-inch nozzle, and the test was made on the same plug which had been used to throw water on the fire. Notwithstanding the hydrant was turned on in full, the water failed to go higher than thirty feet, which was twenty feet below the minimum pressure required at any hydrant. The air was still and there was no dispute that the waterworks were at the time in about the same condition as they were in during 1894. With regard to this test, the court found (Master's Findings of Fact, No. 9, pr. rec. 92)—

> "the water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent, without notice to the officers and owners of the waterworks company or to the city."

Though not of consequence, it will be noticed that the court did not state the height the water was actually thrown as shown by the evidence.

This finding goes to sustain our charge that the court misconstrued the contract and misconceived the issues made by the law and pleadings. The court found that the pressure had not been constantly maintained and it is obvious from its point of view that the water company was only obligated to maintain a system which would after preparation and under favorable conditions produce a *maximum* pressure to throw the water the required height. The city has not claimed that it was not within the possibility of the system to produce such pressure under such conditions. The city insisted that under the contract it was the duty of the water company to maintain habitually the *minimum*

pressure at any hydrant, and that it was a violation of the contract for the pressure to be found wanting when the fires occurred.

Superintendent Horsley, witness for complainant, testified (see brief of testimony, specification 57) that in 1899 and 1900, during the driest season, on several occasions there was not sufficient pressure to force the water out of the hydrants. In connection with this fact, established by the admission of the superintendent of the company, and that established by the actual test made, the city offered to prove by what happened at the various fires which occurred during the period for which rentals were claimed that the waterworks as constructed and operated did not come up to the requirements as to pressure.

The testimony offered (see brief of testimony under specification 21) was in corroboration of and to supplement other testimony, and tended to show by the numerous named witnesses that the pressure was signally inadequate at any of the fires which occurred during the period for which rents were claimed to prevent destruction by fires. In some cases the pressure was only sufficient to force water to run out of the nozzle, and in such cases, where the heat would permit to be of any service, the water had to be poured upon the fire from above. On other occasions, and even with smaller nozzle than prescribed in the contract, the water could not be thrown more than twenty-five feet. At one fire the pressure was so weak that the roof of a one-story building could not be reached without taking the nozzle to the top of the veranda. At another, within four hundred feet of the pumping station of the water company, the pressure was not sufficient to throw water to the top of a veranda twelve feet high. At none of the fires could water be thrown more than thirty feet.

The primary consideration of the city's agreement to pay was for the protection to be afforded against fires, and the constant presence of the pressure required was essential to

such protection, and it is insisted that this evidence of the actual results of the very service the company had engaged to perform was preeminently relevant and that this was one of the few ways in which the city could establish the absence of required pressure at critical times, and the consequent failure of the company to earn the rentals claimed. No form of test was prescribed by the contract, and it must be plain that any test made by the company after due notice, as contemplated by the court below, would have no bearing on the question as to whether the required pressure was present at all times, since the company would naturally make preparations for a test which could not be accepted as proof of the continuous existence of required pressure. Yet the court, consistent with its theory of the contract, rejected all this testimony, holding that it was irrelevant. A brief of the court's reasons for rejection is contained in specification 21.

The testimony supplements and corroborates other evidence, and shows that the company did not operate the waterworks as required by the contract. If the company's failure to perform its obligation was not otherwise established the case should be reopened for this and other testimony of like character.

The court found (Findings of Fact, No. 9, pr. rec. 92) that—

> "Excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the required pressure."

It is charged that this finding contradicts the evidence (see brief of testimony under specification 36). At one fire, a hydrant was turned on and it took half a minute for the solid, soft mud to be forced out before the water would run. One of the witnesses testified as to the actual test made in 1897, in which the water was not thrown more than thirty feet in still air. Another witness testified that the old tank, before it was torn down, leaked so badly for several years

that it was never filled entirely; that it was usually kept from two-thirds to three-fourths full. Another, that since 1899, he noticed there was no pressure on one occasion. Another witness testified that the tank was empty twice from 1896 to 1899, and that the tank was leaking all the time; that the leak amounted to a considerable stream which interfered with passage on the sidewalk. Another testified that at a fire in June, 1898, on a fair day, with only twenty feet of hose, the water would not reach the roof of a house twenty-five feet high. Another, the engineer of the water company, admitted that the water was muddy and unfit for drinking, and that there was not enough of it to fill the tank, which was very leaky; that sometimes he kept the pumps going night and day, but could not keep the tank full because it leaked so badly. The superintendent of the waterworks admitted that there was no pressure on several occasions during 1899 and 1900, during the dry season.

The court found (Findings of Fact, No. 9, pr. rec. 92) that—

> "No complaint concerning the character of service or amount of pressure was made to the water company until after the institution of the present suit."

This finding contradicts the admission by the superintendent of the waterworks, witness for complainant (see specification No. 58), that complaints were made to him that the water was muddy and unfit for use and smelled badly and that the pressure was insufficient, and that he was asked at times to flush the mains so that the water would clear, the complaints beginning in 1897. This superintendent was between the people and the water company, and he was the one to whom complaint should be made, and his admission brought home to the company full notice and knowledge of the conditions and established ultimate and controlling facts.

The court found (Findings of Fact, No. 6, pr. rec. 90), that no other means for fire protection was afforded by the

city, so that it must have been known that the water of the company would be used at fires, and that the city did not forbid the use of the water by its fire department; that the city continued to enjoy the fire protection after the repudiation of the contract as it did before. The evidence shows to the contrary, that the city had the same means of fire protection it had before the waterworks were constructed, viz: fire engines and an independent supply of water in the city cisterns; that it did forbid the use of the water by the fire department; that it abandoned the waterworks system and so notified the company (see brief of evidence under specification 62).

It is true that the citizens generally, including some volunteer firemen and city officials, did, at fires, use the water of the company, but these persons were all acting, as shown by the evidence, in their individual capacity, and in such emergencies, especially at village fires where the general public takes charge of the fight, it was only natural that these volunteers would seize upon any means at hand to prevent the spread of destruction. The good faith of the city in repudiating the contract should not be impeached because, under the stress of emergency, these citizens laid hold of the company's mains for such protection as might be secured therefrom. The city has been under injunction since September, 1899, not to use water from any system other than that of the water company, and at least since that date neither the circuit court nor the complainant can be heard to charge lack of good faith because, on several occasions attempts were made to use the water of the company.

The complainant made no serious effort to prove such performance by the water company as would entitle it to recover; by its own witnesses the contrary was established. It has rested its case upon an odious estoppel and proposes to fasten the *main contract* upon the people of Dawson through the mere agreement by the city to pay water rentals

for specified protection which has never been furnished. Besides, surely it will not be seriously contended that protection against two or three fires, which were likely to occur annually, was the motive of the *contract, and that the inducement* to the erection of the works was the agreement to pay for the license to take water in such emergencies. The court found (Findings of Fact, 15, pr. rec. 93) that the revenues of the company exclusive of the rentals claimed from the city had been insufficient to pay expenses and fixed charges. The relevancy of this finding eludes us, but it suggests an inquiry. No one can deny that the license instalments to be paid by the city was a mere incident to the main undertaking which was to sell water to private consumers. If the principal undertaking was not profitable, why not? The answer is to be drawn from the evidence. The water was not potable. At times the supply was insufficient and often the water was so offensive as to be unfit for anything but irrigation. Under such conditions there could be but few purchasers. The company was not only guilty of a reckless disregard of moral ethics, but also of business enterprise, and it justly suffered from the result of its own wrongs.

The doctrine of estoppel as preached in this case is such as should not be tolerated. It should not be lost sight of that during all these years the city has unnecessarily suffered loss of property and impairment of health and has been deprived of the comfort of a proper supply of water. The revenues incident to the main undertaking have not been impaired except by the gross improvidence and negligence of the water company, and we challenge reference to any decision of this court favoring estoppel against a city under such circumstances as are in evidence. The court below cited Pikes Peak Power *vs.* Colorado Springs, 105 Fed. 1, and Walla Walla *vs.* Walla Walla Water, 172 U. S. 1, as sustaining such an estoppel. In the first case, the contractor agreed in 1895 to construct a tunnel for the city for $90,000

to be completed by 1897. The time was subsequently extended until September 27, 1898. The contractor had miscalculated as to both time and cost. At the end of the extension the tunnel had cost him more than twice the sum the city had agreed to pay, and $100,000 was still needed to complete the tunnel. The contractor had expended all his means and was unable to proceed without borrowing. Under the circumstances, the city made a new contract with him in September, 1898, granting him by ordinance the use of the water system of the city to produce power to generate electricity and the right to establish conduits and string wires on the streets during a term of 25 years. The contractor agreed to complete the tunnel on or before December, 1899. On the strength of this contract he borrowed money and proceeded with the construction of the tunnel. On February 23, 1899, the city repealed the contract ordinance. The contractor prosecuted his work vigorously and in good faith, and drove the tunnel through the mountain within the time agreed upon, but before the time expired he had not been able to put the finishing touches to the grade in accordance with the letter of the specification. There was, however, an express provision in the contract that if the work was delayed for any cause for which the city was responsible the time for the completion of the work should be extended in proportion to the delay. The city had been responsible for some delay. The city contended that the contract was invalid and insisted that the contractor had forfeited his rights and privileges because he had failed to finish the tunnel within the time limit. The court found that the contract was valid under the laws of Colorado and that the great burden of the work of driving an immense tunnel had been borne and the tunnel substantially completed within the time limit; that the substantial benefits of the contract and the consideration which induced the city to make it had accrued, and that the contractor could not be deprived of his rights upon such a bare technicality. No moving principle can be found

in the case which can be applied to the one at bar. The most striking difference is that in that case there had been substantial performance by the contractor before the expiration of a time limit, while in the one at bar the performance of a continuous contract has been simulated and perfunctory. The city has not reaped any substantial benefit such as the municipality had in the Pikes Peak case. No other just conclusion can be drawn from the evidence than that the performance by the water company has not only been of no practical benefit, but has constituted a menace to the health of the people and the safety of their property, and that the contract has constantly prevented the city from performing its duty to the public. With reference to the Walla Walla case, it is only deemed necessary to say that city was not allowed to set up facts, because in the contract made by it in pursuance of legislative authority, the city made a provision for avoidance and expressly agreed upon the method by which it was to be accomplished. It was not estopped by the preliminary acceptance, made to mark the beginning of the rental period.

Specific Performance.

Ordinarily a city can not alienate its jurisdiction over the streets or its power to serve the public, and before the complainant could be heard to say in a court of equity that the city had violated its contract rights, it was necessary for it to show that there was a valid contract, fair and reasonable in all its parts, which had been performed by the water company in so far as permitted. Logansport *vs.* Logansport, 114 Fed. 688; Home Land *vs.* McNamara, 111 id. 822; Wabash *vs.* Defiance, 167 U. S. 100; Richardson *vs.* Buhl, 77 Mich. 632; Gibbs *vs.* Gas, 130 U. S. 396; Story Eq. Jurisp. 750, 776.

If the agreement by the city to pay rentals is valid, but there is no exclusive franchise, the bill should have been

dismissed, because the remedy was at law. Raton Water *vs* Raton, 174 U. S. 360. It is apparent from the bill that the court could not have entertained equitable jurisdiction except upon the finding that the grant of the franchise and the promise to pay water rentals implied an agreement by the city not to erect waterworks of its own. It is so well settled that equity would not otherwise grant relief, that we must assume for the sake of argument that the company acquired such a franchise, and also that the contract to pay rentals was valid under the laws of Georgia. Notwithstanding the assumption, we maintain that this is not a case in which specific performance should be decreed.

1. A third party such as complainant, with no duties to perform, can not invoke the remedy of specific performance to require the city and the water company to perform the contract between them. The complainant was not in such contractual relation with the city as to be entitled to the relief asked. We have shown under "Privity" that no liability could have attached to the city in favor of complainant except upon foreclosure, or, at least assertion of its right to collect the rentals. The city did not issue any negotiable promises to pay. The case of Fidelity Trust *vs.* Fowler Water, 113 Fed. 560, cited by the court below (Master's Conclusions of Law, No. 2, subd. 8, pr. rec. 110), does not parallel complainant's case. In said case the water company *erected the waterworks for the town*, and in the contract between the parties the trustee of the bonds was made direct payee of the rentals, and when the bonds were issued there was endorsed on the back of each the provision of the ordinance to the effect that the rentals were to be paid direct to the trustee of the bonds, to be applied in satisfaction of the *principal and accruing interest.* Soon after the works were completed they became the property of the town and the first four instalments of the rentals were paid to the trustee and not to the water company. Direct contract relations were established between the town and the trustee, and the

city secured the benefit (the waterworks) of the proceeds of the negotiable bonds.

2. Specific performance will not be decreed against one in favor of another who has been derelict in the performance of his engagement, and a complainant must not only aver but actually prove performance. Marble *vs.* Ripley, 10 Wall. 339; U. S. *vs.* Noe, 23 How. 315; Ohio *vs.* Washburn, 26 Fed. 702; Columbia *vs.* Hagner, 1 Pet. 455. The complainant has not only failed to prove performance by the water company, but the testimony of its own witnesses showed that there had not been performance. We have referred particularly to the details of the evidence under "Recovery," *supra*. We have shown under "Privity" that the complainant could have no other and better rights than those of the water company.

3. It is never decreed as a matter of right, and will not be decreed unless equity and justice can thereby be done both parties to perform. McCabe *vs.* Matthews, 155 U. S. 550; Willard *vs.* Tayloe, 8 Wall. 557; Kirkland *vs.* Downing, 106 Ga. 530. Such decree in this case would not only permit the water company to extort money from the city, but would deprive its inhabitants of the power during a long period to secure water from any other source, thereby forcing them to accept and use such water as the company has supplied and will doubtless continue to furnish.

4. It will not be decreed unless it appears that the mutual performance can be secured thereby. Both parties must be able to perform. Leicester *vs.* Front Royal, 55 Fed. 190; Purcell *vs.* Miner, 4 Wall. 513; Morgan *vs.* Morgan, 2 Wheat. 290; Lipscomb *vs.* Watrous, 3 D. C. App. 1; Pomeroy Contr. 162 et seq.; King *vs.* Hamilton, 4 Pet. 328; Story Eq. Jurisp. 750, 776; Smith Eq. 220. The final conclusions of the court below (Master's Concl. Law. No. 2, subd. 8). shows that this principle has been directly violated. It reads as follows (pr. rec. 112):

"Should the water company fail or refuse to comply with its obligations under the contract, the complainant would have an action for damages for such breach; but it appears that the water company *owns no property other than that covered by the mortgage to the trustee; so that a suit for damages against it would not measure up to the standard of an adequate legal remedy* (italics ours).

"Hence, I conclude that the complainant is entitled to a decree against both the city and the water company, requiring them and each of them to specifically perform the contract between them."

It will be seen that the court below decreed specific performance for the main reason that a suit for damages against the water company complainant could not attain adequate relief. Then, without requiring of complainant any guarantee of performance by the water company, the court advisedly requires the city who is able to perform, and the water company who is not able, being practically insolvent and judgment proof, as shown in the bill, the evidence, and in the informal findings of the court, to perform the contract between them. The finding of the court shows that it anticipated failure by the water company to perform its part of the contract, and yet, in order to protect claimant, it requires the city to pay the rentals notwithstanding. The court evidently proceeded upon the theory that the city had itself issued negotiable bonds. The decree in effect grants relief to complainant and the water company, but leaves the city remediless as against either, the water company being without ability to perform, or pay the penalty for nonperformance. The only liability which can be forced by the court is placed upon the city, and we say that the decree, under the circumstances known to exist, is not only wholly inadequate but is repugnant to every principle of justice and equity (Farmers' L. & T. Co. *vs.* Galesburg, 133 U. S. 156). In this case the court said:

"The danger to the life and health of the inhabitants of the city from impure water, and the continued exposure of the property of the city to destruction by fire from an inadequate supply of water, were questions peculiarly under the care of the municipality."

The bondholders are not the only innocent people involved in this transaction. The inhabitants of Dawson have no contractual relations with the city corporation. They are as innocent as the bondholders, but in the light of their vital interests in the result of the action of the court, the rights of the bondholders dwindle into absolute insignificance. For years, without their consent, they have either been deprived of water or compelled to accept the foul substitute furnished by the water company, and at all times their property has been without adequate protection from fires. It is palpable that the main object of this suit is not to collect the incidental rentals payable for fire protection, but to saddle for years an iniquitous system upon the helpless people of this town, and to force them to take this water. We say that equity will not thus become the instrument of iniquity. King *vs.* Hamilton, 4 Pet. 328.

5. It will not be decreed unless the contract is capable of being enforced by one sweeping order. If the contract requires the keeping of continuous covenants, to be performed by the parties for several years to come, a court of equity will never undertake to supervise the performance of such a contract at the instance of any party (Berliner *vs.* Seaman, 110 Fed. 30; Oregonian *vs.* Oregon, 37 id. 733; Strang *vs.* Railroad, 41 C. C. A. 474; Marble *vs.* Ripley, 10 Wall. 358; Texas *vs.* Marshall, 136 U. S. 405; Ross *vs.* Railway, Fed. Cas. 12,080), and the remedy will be denied where action by the court would be required at different times and under different circumstances, and under conditions which would be next to impossible to anticipate. Strang *vs.* Richmond, 93 Fed. 71; Pullman *vs.* Texas, 11 id. 625; Cathcart *vs.*

Robinson, 5 Pet. 264; Anson *vs.* Townsend, 73 Cal. 415; Atlanta *vs.* Speer, 32 Ga. 550; South & North Ala. *vs.* Highland, 98 Ala. 400; Elec. Light *vs.* Mobile, 109 id. 195; Chadwick *vs.* Chadwick, 121 id. 580; Knott *vs.* Mfg. Co., 30 W. Va. 790. Before granting a decree for specific performance, a court should glance forward to assure itself of practical results. It would undertake nothing which it could not enforce with a reasonable degree of certainty of justice. In the case at bar, should not the court in the first place feel in duty bound to construe the contract so the parties would know what to expect in the performance? If the contract, as we claim, requires a constant minimum pressure that will throw water fifty feet high, would not the court direct the company to maintain such pressure? Should it so direct, would it not be the duty of the court to see that the pressure is maintained? If so, how is this duty to be performed? If the court provide no machinery of its own to enforce performance by the water company, and should the company fail to respond to the decree, how could the city in justice be required to pay the water rentals? If permission be given the city to file ancillary complaints for each failure of pressure, would not the court as well as the city be overburdened, judging the future by the evidence of the past? Should the court find the complaints well founded, how would it force the water company to keep its contract, especially since it appears in this case that it is practically insolvent and its system inadequate? If the contract requires suitable water, as we claim it does, for domestic purposes, how would the court know whether the company complies with its obligation in this regard? Of course the people could abstain from renting water, as some have done, but we feel sure that a decree would not contemplate depriving the inhabitants of a suitable water supply. How is this water supply to be tested and failure of performance by the water company proven? Would it depend upon ancillary suits by the city or by new

suits by consumers? This is a continuing contract, the proof of performance of which, both as to pressure and as to quantity and quality of water, will require tests made every twenty-four hours, and we may say a decree of performance in such case should foresee and anticipate such questions as must necessarily arise. If the decree can not be made sweeping enough to provide substantial justice to all parties, then the court was not justified in assuming supervision over the performance of the contract. In this regard it was said in Berliner *vs.* Seaman, 110 Fed. 34:

> "Were the court to assume supervision of this continuous contract now, and enforce its performance by its injunction, it must continue this supervision, and see to it during the whole existence of the contract that both parties fulfilled their mutual obligations. This has been repeatedly declared to be outside of the functions of a court of equity."

In Ross *vs.* Railway, Fed. Cas. 12,080, Mr. Justice Miller said:

> "At every step of its progress, the interposition of the court, either by orders in this case or by decrees in successive cases, may be invoked if we are at this time to lend aid of chancery to either of the parties. It is not difficult to foresee the mischief of such a course. The rule is settled, even in the English chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty, extending over a number of years, but will leave the opposing party to his remedy at law."

Similar reasons for refusing decrees were given in Texas & P. R. Co. *vs.* Marshall, 136 U. S. 393; Marble *vs.* Ripley, 10 Wall. 358, and numerous other cases. In Marble *vs.* Ripley, while the contract was with reference to supplying marble, the objections raised by the court are obviously ap-

plicable to the circumstances which exist in the case at bar. The duties with reference to the marble were continuous. They involved skill, labor, and judgment. In case of decree, the court would be liable to be called on at all times to determine whether the proper quality and quanity of marble had been delivered, and whether every block was from the right place. The marble had to be delivered in certain kinds of blocks, and it was held that the court was incapable of determining whether they were in compliance with the contract and no decree could be framed which would end the controversy.

The cases cited by the court below to justify its decree are easily distinguished from the decisions cited by us. In those cases, the decrees were granted because they could be made "self-operating and self-executing." The only decree which could have such operation in the case at bar would grant relief to the complainant in disregard of justice to the city and its inhabitants.

It is obvious from our point of view, at least, that the decree granted by the court below violates most of the prerequisite equitable maxims as well as some of those descriptive and substantive.

"Salus Populi Suprema Lex."

Even were an exclusive franchise lawfully conferred the city did not part with its police power and its duty to protect the public health and safety. N. O. Gas *vs.* Louisiana, 115 U. S. 650; Louisville Gas *vs.* Citizens Gas, id. 683; Butchers *vs.* Crescent City, 111 id. 746; Stein *vs.* Bienville Water, 34 Fed. 145. Such duty is paramount. Chicago *vs.* Nebraska, 170 U. S. 57; N. Y. *vs.* Bristol, 151 id. 556; and there is nothing in the Federal Constitution which was intended to impair it. Barbier *vs.* Connolly, 113 U. S. 27; Beer *vs.* Massachusetts, 97 id. 33; Walla Walla *vs.* Walla Walla, 172 U. S. 14; and whatever is contrary to public policy, or inimical to public interests, is subject to police

power, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry. L. & N. *vs.* Kentucky, 161 U. S. 677.

The record evidence in this case shows that the water was unwholesome and unsanitary for domestic purposes; the waterworks were weak and inadequate for fire protection. Instead of being a source of health and protection, the system is a constant menace to the best interests of the city and its people. Under such conditions as were shown to exist, it was not only its right, but the imperative duty of the city to secure a better supply of water, and this is what it was attempting to do when stopped by an injunction from the Federal court.

In this suit it can make no difference to the court that the city, in renouncing the contract, gave the then controlling reasons for its action, and that the unfitness and insufficiency of the water did not become manifest until after that. The paramount interests of the people are at stake, and this court is bound to take notice of the actual existing conditions. Their rights can not be limited by the agreement of the corporation to pay water rentals or by its declaration as to the cause of repudiation. The facts having been developed by the pleadings and evidence, this court is bound to take notice of them, and passing by all other reasons it could not, in view thereof, grant a decree of specific performance. It has been and is now the duty of the city to take summary action, looking to the protection of the people, and this court will not permit the court below to destroy by injunction the police power which belongs to the municipality.

SUMMARY.

There Was No Jurisdiction.

Under the bill as originally filed the court had no jurisdiction. Diversity of citizenship alone was relied upon for jurisdiction, and this diversity did not exist, as the waterworks company was created and existed in Georgia only and was of legal necessity a plaintiff, though sought to be made co-defendant.

To save the bill from dismissal the complainant amended, seeking to introduce a Federal question, namely, that of the impairment of the obligation to pay for water under the alleged contract and of the alleged grant of an exclusive franchise to the waterworks company.

The renunciation of the alleged contract for the payment for water amounted only to a denial of liability and formal notice of such denial. It was no proceeding on the part of the municipality as a legislative agency of the State under any legislative act of the State.

As the city had no express grant of power from the legislature to grant an exclusive franchise, and as the legislature itself was expressly inhibited by the constitution from granting such a franchise, it is too plain for argument that no such franchise existed or could exist, and the claim of such franchise was mere pretense and no foundation for jurisdiction. If the city could not expressly and directly grant an exclusive franchise, neither the Master nor the chancellor had the power to imply that the city had made such a grant indirectly by agreeing to buy water of the company for the period of twenty years. In such case the court would be simply making for the city a binding contract that violated the constitution of the State.

There Was No Equitable Jurisdiction.

If the city was really bound by the water contract, it acted in violation of, instead of under, State law in renounc-

ing the same, and remained bound under such law to pay, notwithstanding such renunciation.

In the absence of an exclusive franchise, the city had the right to construct and maintain waterworks of its own, notwithstanding the calamities apprehended to the business and property of the waterworks company which might ensue, the case being a clear one of *damnum absque injuria.*

The question of exclusive franchise being eliminated, the complainant's remedies were plainly legal, if it had any rights.

But complainant really had no rights at all, as not a cent was due it on principal or interest.

There was not only no diversity of citizenship, no federal question, no ground of equitable jurisdiction, but so far as complainant was concerned, there was no subject-matter of jurisdiction, the complainant at best being but an assignee of alleged past due rentals, without other consideration than the undertaking on its part to sue in the Federal court on the same alleged contract which had been adjudged void by the Supreme Court of Georgia in the suit of the assignor, the waterworks company, against the same defendant, the city. There was no right of action in complainant in the circuit court.

Res Judicata.

The decision of the Supreme Court of Georgia in the case of the Dawson Waterworks Company *vs.* Dawson, 106 Ga. 696, is conclusive against the complainant on the question of the validity of the alleged contract and the right of the city to plead its invalidity.

Up to the time of its rendition, the Waterworks Company alone had collected the rentals or asserted the right to do so. That company alone had sued for such rentals and asserted any dominion over the contract. Until that company had selected the trustee as payee of rentals under the original contract, or had made some lawful assignment of such

rentals, that company alone had the right to sue or to otherwise raise the question of its validity.

Before the selection of a trustee and before the assignment to complainant, the decision of the Supreme Court of Georgia at the suit of the Waterworks Company had been rendered. Not only the subsequent assignee, but everyone having any interest in the rights of the Waterworks Company under that contract was concluded by that decision That contract in a suit upon the same by the original and highest and fullest owner thereof, and at the time the sole representative and possessor of the same, had thus been judicially condemned.

As alternative payee the trustee was a secondary payee, and as assignee was a subsequent assignee, and such trustee can not, either as secondary payee or subsequent assignee, or both, deny this condemnation.

There Was No Valid Contract.

Under the constitution of Georgia, as construed at the time of and since the date of the alleged contract, the same was void. This plainly appears from the decision in the Waterworks Company *vs.* Dawson, 106 Ga. 696, which not only adjudges this particular contract to be void, but holds and shows that the same was void under the constitution of the State as previously and with practical unanimity construed by that court since the adoption of the constitution and from dates prior to that of the alleged contract.

There Should Have Been No Recovery of Rentals.

Assuming that the contract for rentals was valid, and all grounds of equitable jurisdiction disappearing, the right of complainant to recover the rentals that were due was at law on sufficient proof of performance by the waterworks company of its contract as to required pressure and quality. There was no such proof for any one year or other definite period. In the original bill, the complainant had alleged

such performance as prerequisite to recovery. The Master not only does not hold that such performance had been proven, but in effect, though not formally, holds the contrary, both as to pressure and quality, and recommends recovery on the ground that proof of such performance after acceptance of the system by the city was unnecessary, and that the city had no right to plead non-performance, although in his argument to prove that the alleged contract attempted to create no debt as contemplated by the constitution, he says in effect that there could be no debt until performance. He goes to the extent of recommending recovery and decree for specific performance now for the rentals due and not due, including the year 1911, and the court decrees accordingly.

There Should Have Been No Decree for Specific Performance.

If there were any right to collect rentals, the plain remedy was by suit at law as they accrued. The requirement that the city use the water was unnecessary, because if the contract is valid and the waterworks company is able to perform and tenders performance, the right to recover is just as complete as in case of performance.

As to future rentals, the court simply had no power to decree in advance that the company and the city should perform at the instance of the complainant, the one to furnish the required quality and quantity of water and the other to make the future semi-annual payments. The decree for specific performance in this particular is wholly inconsistent with complainant's positions, as follows:

That the company had already performed, was performing, and intended to continue to perform.

That there was no debt on the city until performance and therefore no debt attempted to be incurred in violation of the State constitution.

If we are to interpret the decree as requiring payments

of future rentals without performance on the part of the company in accordance with the view of the master, it is still more unjust and inconsistent.

It adjudges complete indebtedness now for future rentals, thus holding that the twenty year contract created instantly two annual indebtednesses for every year for twenty years, after holding that contract valid because it did not create any debt.

There Should Have Been No Injunction.

The proof showed pressure insufficient and water unsuitable; that destructive fires were in consequence frequently occurring practically unhindered; that the water was at times muddy, filthy, and too offensive for domestic use. Should it be necessary to consider the merits of the case, the appellant urges the court to a full consideration of the evidence. The city, on account of the health of the people, and in order to secure protection from fires, was simply forced to secure waterworks of its own, and it was in the performance of a plain duty, proceeding lawfully to do so, when enjoined not only in said proceeding, but from making any other possible arrangement for securing water for the most necessary purposes and restricted to the alleged contract with the waterworks company, in plain violation of the appellant's rights and in utter disregard of the safety and health of thousands of people of the city of Dawson. *Salus populi suprema lex.*

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January 3, 1905.